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“CIVIL CODE”

from Pres. Angelo

—IN—

CALIFORNIA.

—BY—

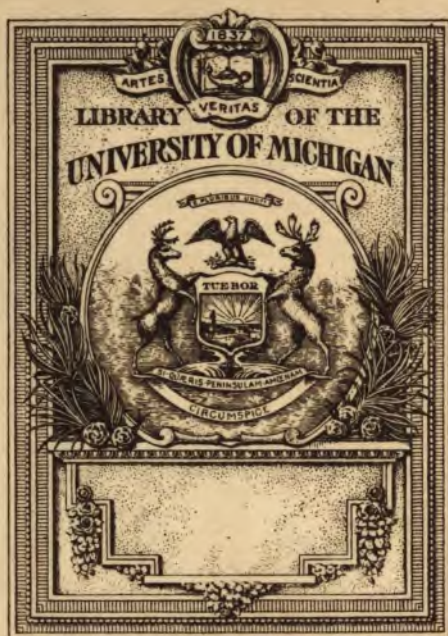
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DEPARTMENT OF THE UNIVERSITY OF CALIFORNIA.

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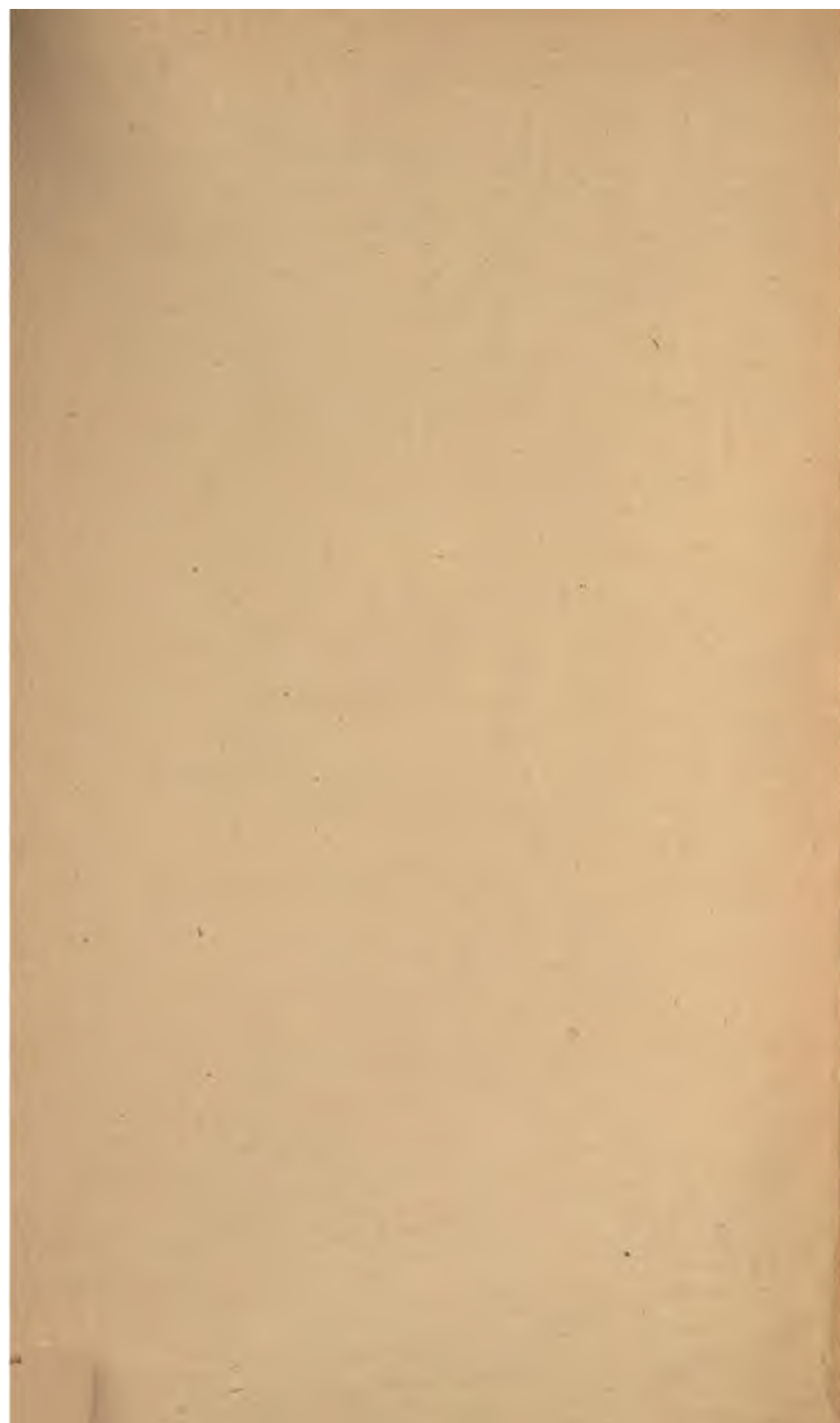
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THE "CIVIL CODE"

IN

CALIFORNIA.

— BY —

JOHN NORTON POMEROY, LL.D.,

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PREFATORY NOTE.

The pages herein reprinted from the *West Coast Reporter* (Vols. 3 and 4, for 1884), are from the pen of JOHN NORTON POMEROY, LL. D., whose recent death has been greatly lamented.

His great legal abilities, his position as Professor of Municipal Law in the Hastings Law Department of the University of California, the principal Law School in that State, and his admitted eminence as a writer on different branches of the law, give an especial value to his opinions upon the subject of the actual operation of the Code of California.

That Code is understood to be, for the most part, a copy of the draft reported to the Legislature of New York in 1865, by the Code Commissioners, and therefore substantially identical with the one which has been and still is so persistently urged upon the attention of the Legislature of New York. This consideration renders the conclusions of Prof. Pomeroy upon this work of peculiar value to the legislators of New York, and to all others whose duty or curiosity may excite in them an interest in the question of Codification of the Common Law.

The conclusions of Prof. Pomeroy appear to be these:

1. That the Code of California is replete with errors, uncertainties and inconsistencies, and that nearly every important section will demand *judicial interpretation* before its true meaning can be ascertained ;

2. That under its operation the administration of the law in that State is threatened with a wide-spread deterioration, which will compel (unless in some manner arrested) an abandonment of all the Code legislation ;

3. That for this portentous mischief no remedy can be expected from legislative action ;

4. That the sole remedy lies in some deliberate adoption by the Courts of a method of interpretation different from that hitherto applied to statutory law.

NEW YORK, April 3, 1885.

SPECIAL COMMITTEE APPOINTED BY THE NEW
YORK BAR ASSOCIATION (OCTOBER
13, 1884), TO "URGE THE REJECTION
OF THE PROPOSED CIVIL CODE."

THE "CIVIL CODE" IN CALIFORNIA.

It is a matter of the utmost practical importance to the entire jurisprudence of the state, to the rights of suitors, and to the interests of the whole body of citizens, that the supreme court should openly and avowedly adopt, and strictly and undeviatingly follow, some well known, uniform and consistent principles of interpretation, in adjudicating upon, applying, and enforcing *all* the various sections of the civil code. As decision after decision is made giving a construction to the language of the code *without such a method*, members of the bar will be wholly unable to advise their clients, with any certainty, as to the meaning of particular provisions which have not yet been expressly interpreted; and after the process has thus gone on for some few years, the whole law, based upon the code, will have become a mass of uncertainties, inconsistencies and contradictions, so that the welfare of the public will demand a complete repeal or abandonment of the code legislation. It has seemed to me that a practical benefit would be conferred upon the profession of the state by suggesting the true principles of interpretation which should be applied to the civil code. I may be permitted to add, that my position as a teacher of the law, compelled to deal with the code as a whole and with all of its separate parts, to examine, compare, contrast and expound all of its material sections as constituting elements of a complete

system—this duty, I say, perhaps enables me to perceive more clearly than the practicing lawyer, the defects and imperfections of the code, and to appreciate the imperative necessity of adopting some uniform method or principle in its construction and interpretation. I purpose, therefore, in a few pages, to inquire, and, if possible, to show the true method and principles of interpretation which should be adopted and pursued without deviation by the courts, and especially by the courts of last resort, in their work of judicially expounding all parts, sections and clauses of the civil code, so that the results of their decisions may constitute a harmonious, and consistent, and just system, and may determine the rights and duties of citizens with clearness and certainty. The civil code of California, among all other instances of similar legislation, pre-eminently needs judicial interpretation. There is hardly a section, whether it embodies only a definition, or whether it contains the utterance of some broad principle, or some general doctrine, or some single special rule, which does not require to be judicially interpreted in order to ascertain with certainty its full meaning and effect. Upon this great work of construction and interpretation, the supreme court has, in reality, but just entered.

Our civil code, regarded as a comprehensive system of statutory legislation, covering the entire private jurisprudence of the state, as a scientific or practical arrangement and statement of the principles, doctrines and rules constituting that jurisprudence—in other words, as an example of *true codification*—is, even in the estimation of its original authors, full of defects, imperfections, omissions and even inconsistencies, which must, so far as possible, be supplied, removed and harmonized by the courts, for it is useless to expect any real aid from the legislature. I shall * * * * attempt to collect, arrange and describe the most important and material of these defects and imperfections, which run through the entire code, and directly affect its essential nature as a work of legislation, and which imperatively demand for it some fixed, uniform and consistent method or principles of in-

terpretation. In the present, and to some extent, introductory pages, I purpose simply to give one or two detached and striking instances of these defects by way of illustration.

One of the most common and striking defects—a defect which may be said to characterize the entire code as a work of legislation, and is found to a greater or less extent in almost every section—is the employment, by its authors, of language which renders the meaning, intent, and consequent effect of the particular provision obscure and uncertain. From their constant, but wholly unnecessary practice, of abandoning well-known legal terms and phrases, the signification, force and effect of which had long been settled and certain, and of adopting instead thereof an unknown and hitherto unused language and terminology, as well in their ordinary definitions as in their statement of general doctrines and single rules, they constantly create an uncertainty whether they intend merely to declare and restate, without change, a known common law definition, doctrine or rule, or whether, on the other hand, they intend to alter or modify such definition, doctrine or rule; and if the latter be their general intent, they make it uncertain how far the alteration extends. All such uncertainties—and they occur, I repeat, to a greater or less degree in the great majority of sections—can only be settled by the process of judicial interpretation. This defect, which is one of the gravest importance, and which imparts a destructive character to the entire legislation, I shall discuss at length in a subsequent page.

Furthermore, it not unfrequently happens that in a most important section, introducing perhaps some new rule, when their *general* intent may be indistinctly conceived of and speculatively apprehended, or, in other words, can be supposed or *guessed* at, the codifiers have employed such partial, imperfect and restrictive language, that their supposed general intent is not expressed; and such a supposed meaning cannot be given to the provision without adding some material terms to it, and directly violating all the settled rules of statutory construction. In other

words, the rules as embodied in the actual language of the section, and by giving to that language all its possible effect, is plainly imperfect, partial, unnecessary and even unjust. A court can see at once what the rule ought to have been, and can speculate and suppose that the authors of the code had such true rule within their general intent. But to construe the provision as laying down this true rule requires the court to break through the established doctrines of statutory interpretation, to virtually incorporate additional and most material words into the provision as it stands, and thus in reality to perform the work of the legislature. The court may sometimes consider itself as forced to adopt this extreme method of proceeding, but by doing so it violates the fundamental principle of statutory construction, namely, that the intention of the legislators must be found *in the language which they have employed*, and not by importing into the clause other words which they might have used, but in fact did not use. From the numerous instances of this particular defect, I give the following striking illustration.

The following, as is well known, were settled and familiar rules of the common law. When a legatee is actually dead at the time of making the will, or dies after the making of the will, but during the lifetime of the testator, then the legacy to him was said to lapse; in other words, the gift to him wholly failed, it did not pass to his own personal representatives, next of kin or heirs, nor had he any power to dispose of it by his own will, if he made one. The same rule of the common law also applied to a devise of any real estate.

The effect of such "lapse" was somewhat different in the two cases of a legacy and a devise. Whenever a legacy of personal property thus lapsed, the specific property bequeathed, if the legacy was "specific," or the amount of assets which would have been requisite to pay it, if the legacy was "general," fell into the residuum, and passed by the "residuary clause" to the "residuary legatee," provided there was a residuary clause in the will. If there was no residuary clause to catch the property, then as to

said property the testator would die intestate; the amount would be actually undisposed of by the will. When a devise of land lapsed, then by the common law rule based upon certain arbitrary reasons, the land embraced therein would not be included within any residuary clause of the testator's real estate, even when there was such a clause; but in any such case it descended to the testator's heir or heirs-at-law, he dying intestate with respect to such land.* These rules of the common law often worked great injustice. As soon as the work of legal reform began, during the present century, statutes were passed by the British Parliament and by the legislatures of many American States, altering their common law rules, and providing that, under certain circumstances described, legacies of personal property and devises of land should not "lapse" by the death of the legatee or devisee. All these amendatory statutes expressly applied to both legacies and devises; and of course the change, if made at all, should extend to both alike. Let us see what legislation on the subject is contained in the civil code. The code re-enacts the common law doctrine *as the general rule* applicable in all cases except certain particular ones for which a different rule is provided: "§ 1343. If a devisee or legatee dies during the lifetime of the testator, the testamentary disposition to him fails, unless an intention appears to substitute some other in his place, *except as provided in § 1310.*" It will be noticed that this provision expressly mentions both a devisee and a legatee. This section is the common law doctrine applied to all cases except those mentioned in § 1310.

Turning to § 1310, we find that it reads as follows: "When any *estate* is *devised* to any child or other relation of the testator, and the *devisee* dies before the testator, leaving lineal descendants, such descendants take the *estate*, so given by the will, in the same manner as the *devisee* would have done had he survived the testator."

* See *Maybank v. Brooks*, 1 Bro., ch. 84; *Goodright v. Wright*, 1 P. Wms., 397; *Elliott v. Davenport*, *Id.*, 83; *Appleton v. Rowley*, L. R., 8 Eq., 139; *Browne v. Hope*, L. R., 14 *Id.*, 343.

Before commenting upon this provision, it may be well to compare its language with that found in other similar statutes. The similar English statute, which first made a like change in these common law doctrines, and from which all of our American legislation on the subject is derived, declares in the plainest and most express terms that legacies of personal property and devises of real estate to a child of the testator shall not lapse.* A comparison with the New York civil code is the most striking. It is well known that a very large portion of our California civil code was borrowed by its authors, and often copied word for word, directly from the provisions of the "civil code" prepared by the New York Commission.† The § 1343 of the California civil code, heretofore quoted, is copied word for word, except its last clause, from § 605 of the New York code, which reads: "If a devisee or legatee dies during the lifetime of the testator, the testamentary disposition to him fails, unless an intention appears to substitute some other in his place."

The section of the New York code corresponding to § 1310 of the California civil code, is as follows: "§ 575. Whenever any real or personal property is disposed of by will to a descendant or a brother or sister of the testator, and such *legatee or devisee* dies during the lifetime of the testator, leaving a successor who survives the testator, such disposition does not lapse, but the thing so disposed of vests in the surviving successors of the legatee or devisee." This comparison makes it certain that the authors of the California code had the provisions of the New York code before them, and that in drawing up their § 1310 they intentionally departed from the language of the corresponding § 575 of the New York code in all the particulars in which the two are different. To show that the author of the California code understood perfectly

* 1 Vict., ch. 26, § 33.

† This proposed civil code of New York was drawn up by commissioners appointed under a statute of 1857. It was finally completed, reported to the New York Legislature, and published in a book form in 1865. This code, as thus prepared, has never been adopted by the Legislature of New York, and has therefore never become a law.

the distinction between a devisee and a legatee, and appreciated the importance of mentioning both when they desired to state a general rule, I quote another section in the same connection from our civil code, namely: "§ 1344. The death of a devisee or legatee of a limited interest, before the testator's death, does not defeat the interests of persons in remainder who survive the testator."

The § 1310 of our civil code, above quoted, is a more striking example of the defect which I have described. Its most inappropriate terms must give the courts great difficulty in its interpretation, unless the judges are willing to boldly legislate, and add language to it which cannot possibly be found in it. By the plain, ordinary, unmistakable meaning of its words, the section applies alone to, and its operation is confined alone to, the case of a devise of land to a devisee; and no admissible rules of interpretation can make it read so as to include the case of a legacy of personal property. In fact, the codifiers seem to have taken great pains to show their intent that the section was to be confined to devisees of land. It is true that the word "devise" *may* possibly appear from the context to embrace a testamentary gift of personal property; but any such meaning seems to be carefully excluded by the context in this section. In the first place, the codifiers lay down the general rule in § 1343, expressly mentioning both a devisee and a legatee, and apply this rule to all cases except those mentioned in § 1310. There we find that the exception of § 1310 is confined to the case of a *devise*, and all the terms of this section are so chosen as to show that "devise" means testamentary gift of land alone. All the operative words are appropriate to such a gift and not to a bequest of personal property. We have "estate," "devised," and "devisee," constantly repeated. This conclusion is still further strengthened by the comparison I have made with other similar statutes, which shows that the codifiers intentionally omitted all mention of "legacy," or "legatee." I repeat, the plain, ordinary, and natural meaning of these words confines the section to devises of real estate, and excludes legacies of personal

property. And yet it is almost impossible to conceive that the authors of the code intended to have the common law rules in full operation in all instances of lapsed legacies, and to change them only in some instances of lapsed devises. The construction which extends this provision alike to lapsed devises and legacies, is the one demanded by the plainest requirements of justice and equity; but such a construction is nothing but actual legislation, and would violate the fundamental canons of statutory interpretation. The whole subject is thus left in great doubt and difficulty.

I will very briefly mention one other example of the same species of defect. By § 1313 it is said: "No estate, real or personal, shall be bequeathed or devised to any charitable or benevolent society," or for charitable uses, "except the same be done by and duly executed at least thirty days before the death of the testator; and if so made at least thirty days prior to said death, such devise or legacy, and each of them, shall be valid; *Provided*, that no such devises or bequests shall collectively exceed one-third of the estate of the testator leaving *legal heirs*," etc. This section presents two difficulties for judicial interpretation. The first is, whether the amount of charitable gifts must not exceed one-third of the gross estate before the testator's debts, etc., have been paid, or one-third of the net estate after such debts, etc., have been paid. The supreme court have settled this doubt by adopting the latter interpretation. The other difficulty is more serious, because its answer must be, to a great extent, arbitrary. The import of the proviso is that if the testator dies leaving no "legal heirs," then there is no limit to the amount he may give for charitable purposes; but if he does leave "legal heirs," then he cannot give more than one-third of his net property for charitable uses. What is meant by "legal" heirs? Can there be any heirs which are not legal? What would be illegal heirs? Does the term "legal heirs" mean the same thing as "heirs?" If so, then the proviso must mean, that if the testator leaves *any heirs*, his charitable gifts are lim-

ited to one-third of his net estate; while only in case he leaves no heirs at all, can he dispose of his property for charitable uses without limit. In other words, by this construction, it is only where his property would escheat for want of any heir to inherit, in case he should die intestate, that he can dispose of his estate by will without limit to charitable purposes. This construction seems to be unnecessarily harsh and unjust. If, on the other hand, the phrase "legal heirs" is not synonymous with "heirs," what meaning can be given to it? Is it possible that by the term "legal heirs" the legislature intended to include only *lineal heirs*—that is, issue or descendants? Something might be said in favor of the reasonableness of this construction. But it is not my design to discuss the true interpretation of the section. I have only cited it to show that, in applying a most important and practical provision, the courts will be compelled to interpret language in an arbitrary manner, so that their work will differ little from actual legislation.

I will mention briefly another entirely different and wholly unnecessary defect of our code—a defect which a little care would have removed, and which is extremely annoying and often misleading. It is a defect of arrangement. No reader of the code can feel certain that any given title or chapter relating to a particular subject matter contains all the rules which have been enacted concerning that subject matter, and which affect the private rights, duties and relations of persons. Additional rules, often of the very highest importance, are found in wholly different and unconnected portions of the same code, or even in the other codes—the political code or the code of procedure—in portions where no ordinary reader would have expected to find them. For example, the title and chapters on "Marriage," "Divorce," "Husband and Wife," "Parent and Child," should contain *all* of the rules which define the status of marriage, of valid and void or voidable marriages, of legitimacy or illegitimacy of the issue, and the like. The lawyer or the judge ought to feel an absolute certainty that, so far as private and

civil rights at least are concerned, these chapters embraced *every* statutory rule binding on the courts relating to these subject matters. On the other hand, the chapter on "Successions" should be confined to a statement of all the rules determining the circumstances under which the relatives of a deceased are entitled to a share in his property, what relatives are thus entitled, and the shares of the property which they shall respectively receive. Rules determining *who are relatives*, *who are legitimate* or *illegitimate*, etc., do not belong to *this* chapter, but belong exclusively to the title which deals with the *status* of marriage and of the issue of a marriage. Such being the ideal of a code, what are the facts as found in our civil code? In the title on "Marriage" we find certain marriages declared to be absolutely void and others voidable;* provisions for annulling voidable marriages by a decree of the court;† a general provision that not only voidable marriages but also voidable and incestuous marriages *may* be annulled by a judicial decree, although such proceeding does not seem to be made necessary.‡ In regard to the legitimacy of issue, this title contains the following special provisions: "When a marriage is annulled on the ground that a former husband or wife was living, or on the ground of insanity, children begotten before the judgment are legitimate."§ "When a divorce is granted for the adultery of the husband, the legitimacy of children begotten of the wife before the commencement of the suit is not affected;¶ and when the divorce is on account of the wife's adultery, the legitimacy of the children begotten before the commission of the adultery is not affected, but the legitimacy of her children begotten after her adultery may be questioned, and must be determined by the court on evidence."***

The title "Parent and Child" says that "all children born in wedlock are *presumed* to be legitimate."†† This section does not make all children born in wedlock absolutely legitimate; it only raises a presumption. That pre

* §§ 58, 59, 60, 61, 62.
¶ § 144.

† §§ 82, 83.
** § 145.

‡ § 80.

§ § 84.
†† § 193.

sumption *may* be overcome, and a child, although born in *lawful* wedlock, *may possibly* be illegitimate. Furthermore, the section, in speaking of "wedlock," of course, means, by all rules of interpretation, lawful wedlock. If a marriage is absolutely void, as being incestuous or criminally bigamous, etc., there is really no wedlock, and the children are not born in wedlock. All these provisions are found in the proper title and chapters; and every reader of the code has a right to assume that no other provisions determining who are or who are not legitimate shall be found in any other part of the civil code, nor in any other of the various codes. If the authors of the code thought that these provisions were insufficient and proposed any additional rules, such rules should have been incorporated into these same chapters. Turning to the title on "Successions" we find, after some general definitions, a long section,* in which the shares of property which the husband, wife, children, other issue and next of kin of the deceased intestate are entitled to take under various specified circumstances. The rules given in this section apply, of course, to legitimate children, issue and relatives. In the next section† are given rules concerning the rights of illegitimate children or issue to succeed. At the end of this section, utterly unconnected with its previous provisions or subject matter, and utterly foreign to the object and subject matter of the entire title, we find the following sweeping clause: "*The issue of all marriages null in law or dissolved by divorce are legitimate.*" I do not now propose to discuss the monstrous impropriety of this provision as a rule of law, nor its flat contradiction of the special clauses cited above from the previous chapters of the code. Taken literally—and it seems impossible to escape from the result—it means that the children of all void marriages, even though incestuous or criminally bigamous, and whether annulled by a decree of the court or not, and the children of all marriages dissolved by divorce, as well for the adultery of the wife as

* § 1386.

† § 1387.

for other causes, and even though the evidence might demonstrate the fact that the children were begotten and born from the adulterous connection of the wife, are legitimate, and as such are entitled to succeed to the property like other legitimate issues. My only purpose, at present, is to illustrate the serious defect of the Code which I am describing. Here is a clause, not only making most sweeping additions to the rules concerning legitimacy contained in the chapters which properly treats of that subject, but even altering and contradicting those rules, found in a portion of the Code where no ordinary lawyer would naturally look for it—hid away, so to speak, at the end of a long section treating of other matters. A practicing lawyer might use the Code for years without noticing this clause; and we presume that most readers who have noticed it, have merely stumbled upon it. Nor is this an isolated and exceptional case. Unfortunately this defect of arrangement is found, to a greater or less extent, in all parts of the civil code, and certainly detracts very much from its usefulness.

I will give one more illustration. The common law recognizes a mode of acquiring property in things by occupancy, the property being thus acquired at once, by the party's own act, there being no other lawful owner. Finding a chattel is one mode of occupancy. At the common law the finder of a chattel acquires the property in it immediately if the former owner had completely abandoned it, or if there is no other owner who makes claim to the thing. The Civil Code recognizes occupancy as a mode of acquiring property, but does not define it.* In the title on "Deposit," there is, strangely enough, a chapter on "Finding." This chapter contains several rules defining the finder's duties towards the real owner; but contains no provision whatever applicable to the cases where the former owner had abandoned the chattel, or where there was no former owner who made claim, in which cases at common law, the finder at once acquired

* § 1006.

an absolute property by his act of finding. These are all the provisions of the Civil Code, in any matter relating to the subject, nor is there in the text any reference to the other codes. The common law rule referred to is, of course, a rule of private property, and should be embraced in the civil code, in the title which treats of the modes of acquiring property. Turning to the political code we find a chapter on "Lost money and goods," which prescribes certain proceedings to be taken by the finder in order to discover the true owner. This chapter alone contains a section embodying the common law rule by which the finder acquires absolute property in the chattel in case no owner appears to claim it.* All these provisions clearly have no proper place in a political code, and I venture to say that no person at all acquainted with statutory legislation would naturally look for them in the political code; and no intelligent lawyer would naturally look for them elsewhere than in the Civil Code in the chapter concerning the acquisition of property. These examples are sufficient, at present, to illustrate the defects which I have described.

Having thus described and illustrated a class of special defects of the Civil Code, which render the true meaning and intent of particular provisions very uncertain, and which seem to require actual legislation by the Courts in prosecuting their work of judicial interpretation, I return to an examination of the Code as a whole. As stated in the previous pages, one main defect, which characterizes the entire legislation, is the uncertainty constantly felt by lawyers and judges, whether its provisions are intended as simply declaratory of existing common law doctrines and rules, and as mere re-enactments of them in a statutory form; or, whether, on the other hand, they are intended to be modifications, alterations and changes of the common law doctrines and rules concerning the particular subject matter, and if so, to how great an extent such modifications and alterations are intended to be

* Pol. Code, § 3139.

carried. This uncertainty results, it was remarked, *partly* from the practice adopted by the authors of the Code in all parts of their work, of abandoning, in their definitions and statements of doctrines and rules, the well known and familiar legal words and phrases which have been generally used by judges and text-writers in formulating such definitions, doctrines and rules, and the meaning of which had become perfectly fixed and certain, and of employing in their stead new and unfamiliar words and phrases, unknown as terms of legal nomenclature, and hitherto unused by text-writers and judges, and of which the full meaning and effect are still unfixed and uncertain, and can only be ascertained and settled by a long course of judicial interpretation. This method of using words and phrases does not result from any comprehensive plan of rejecting *all* technical phraseology and terms of legal nomenclature in framing the Code, and of expressing *all* its provisions in the simple, popular, untechnical language of ordinary discourse among intelligent men. The authors of the Code have adopted no such plan. Their work throughout follows the traditional and customary style of English and American statutory legislation; its language is artificial, technical and legal, and has no resemblance to the popular language of ordinary discourse. This is seen at once by comparing it with several recent Codes adopted or proposed in England. These English examples of codification, whether drawn up by private authors as mere proposals or suggestions, or enacted by Parliament as statutory systems, have all, without exception, I believe, abandoned the technical and legal style of statutory composition to which we have been accustomed for generations, and have adopted the simple, free, inartificial style and language of common, intelligent speech, in this respect imitating the French Codes. The most remarkable and perfect specimen of this method is the Code for the British dominions in the East Indies, drawn up mainly, if not wholly, I believe, by Sir James Fitzjames Stephen, and adopted a few years ago by Parliament. In order to exhibit the style and language of Codes con-

structed upon this plan, and to enable the reader to compare them with our own Civil Code, I have given a few brief examples in the foot note.* These

* As I have not, at present, a copy of the Codes of British East India, I shall take my illustrations from other recent works of codification; but this will show the method which they have all pursued in the clearest manner. In 1878, Sir James Fitzjames Stephen, who is certainly one of the very ablest of English judges and jurists, and who is the leading advocate of codification, drew up a Penal Code for England which was, with some suggested amendments, mainly declaratory of the existing rules of the law concerning crimes and punishments. This proposed Code was submitted to Parliament, and was by it referred to a commission consisting of Lord Blackburn, Lord Justice Lush, and Justices Barry and Stephen. The commission after a most laborious examination reported back to Parliament a proposed Penal Code, containing a few alterations of that drawn up in 1878 by Mr. Justice Stephen. The draft of a Penal Code thus recommenced by the commission is still pending before the Parliament, and there is every reason to suppose that it will be enacted and become the criminal law of England. In a criminal Code, from the very nature of the subject matter, the language must necessarily be, to a considerable extent, artificial and technical. It is impossible to adopt the simple and popular language of common discourse as freely in a Penal Code as in a Civil Code. The single illustration which I take at random from the proposed English Penal Code, will show how completely its language and style have abandoned the traditional form and phraseology of statutory legislation, and have adopted, so far as the subject would permit, the popular language and style. It is the section which determines when insanity takes away a person's responsibility for acts otherwise criminal, and constitutes a defense. Annexed to the section are "illustrations" of its meaning and operation. These illustrations are found in all parts of the Code, in connection with every important provision, and form a most remarkable feature of this type of codification. This section is as follows: "No act is a crime if the person who does it is, at the time when it is done, prevented, either by defective mental power, or by any disease affecting his mind, (a) from knowing the nature and quality of his act, or (b) from knowing that the act is wrong, or (c) from controlling his own conduct, unless the absence of the power of control has been produced by his own default. But an act may be a crime although the mind of the person who does it is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act.

"*Illustration.* (1st.) A kills B under an insane delusion that he is breaking a jar. A's act is not a crime, (2d.), (3d.), etc. * * * (7th.) A patient in a lunatic asylum, who is under a delusion that his finger is made of glass, poisons one of the attendants out of revenge for his treatment, and it is shown that the delusion had no connection whatever with the act. A's act is a crime." I say nothing as to the merits or demerits of the legal rules concerning insanity here laid down, but it is plain upon comparison that there is a most marked contrast between the simplicity, clearness and ease of this style and language, and the artificial phraseology of our Penal and Civil Codes. I add one or two, and perhaps better, examples from Codes not criminal. In 1872, Sir James Fitzjames Stephen drew up a Code of the law of evidence to be submitted to Parliament. It was not, however, enacted by the Legislature, and its author subsequently published it, with a few alterations, under the name of a "Digest of the Law of Evidence." Although this is a private work, and has no higher authority than an ordinary text book, yet it furnishes a most admirable illustration of the type of codification I am describing. It is in the form of a code, as though it were a statute enacted by parliament; its provisions are expressed in simple and popular language; and every important section is accompanied by "illustrations" which would form a part of the legislation if it had been passed. In that, it follows the type of the Indian Code. I give one important provision. Chap. II, art. 9, "General definition of relevancy. Facts, whether in issue or not, are relevant to each other

extracts show that the authors of our Code have not attempted to follow this type of legislation by exercising their rules in the simple and natural language of ordinary discourse or writing, but have retained the artificial, technical, and legal phrases and modes of expression which have long characterized the English and American statutes. While following this style of composition which had become traditional in our statutory legislation, the authors of the Code have constantly, and often in the most essential parts of their definitions and statements of doctrine, substituted new and unknown words and phrases in the place of those legal terms and expressions which have hitherto been generally employed by writers and judges, which are familiar to the profession, and the meaning of which are fixed and certain.

To show the correctness of this statement in all its fullness would require a verbal analysis and criticism of a very large

when one is, or probably may be, or probably may have been, the cause of the other;—the effect of the other;—an effect of the same cause;—a cause of the same effect; or when the one shows that the other must or cannot have occurred, or probably does or did exist, or not; or that any fact does or did exist, or not, which in the common course of events would either have caused or have been caused by the other; *provided* that such facts do not fall within the exclusive rules contained in chapters III, IV, V, VII; or that they do fall within the exceptions to those rules contained in those chapters." [The four chapters here referred to deal with particular facts which are, in general, irrelevant; and of course give the excepted cases where the facts are relevant. Thus chapter III, deals with matters of *hearsay* which are generally irrelevant; but also contains the exceptions.] Annexed are several "illustrations," some of which I quote:

(b.) "A and B each eat from the same dish and each exhibit symptoms of the same poison. A's symptoms and B's symptoms are relevant to each other as effects of the same cause." (d.) "A is charged with committing a crime in London on a given day. The fact that on that same day he was in Calcutta is relevant, as proving that he could not have committed the crime." (e.) "The question is whether A committed a crime. The circumstances are such that it must have been committed either by A, B or C. Every fact which shows this, and every fact which shows that neither B nor C committed it, or that either of them did, or might have committed it, is relevant," etc., etc. I might quote many other examples from this admirable little book, but this single extract must suffice. Another recent work, by a very eminent English barrister, entitled a "Digest of the Law of Partnership," is also written in the form of a code, upon the same plan as to language and phraseology. I quote two short articles, concerning "persons liable by holding out." "Art. 13: A person who has, by words spoken or written, or by his conduct, led another to believe that he is a partner in a particular firm, is responsible to him as a partner in such firm. Art. 14: Whosoever knowingly suffers himself to be represented as a partner in a particular firm, is liable as such partner to any one who has, on the faith of such representations, given credit to the firm." I shall have occasion to make some observations on this type of codification, when discussing the principles of interpretation which ought to guide the Courts in expounding the provisions of our Civil Code.

number of sections taken from all parts of the Code. I venture to say, that there are few important definitions and rules in the Civil Code which have not occasioned more or less perplexity, in the endeavor to interpret them, to really intelligent lawyers, who are familiar with the common law doctrines, and who have acquired the intellectual habit of carefully scrutinizing language in order to ascertain its real important effect. Such an exhaustive analysis, however, is unnecessary, even if my limits would permit it. To accomplish the object of this essay, it will be sufficient to give some examples which illustrate the defects under consideration, and which show the grave importance of adopting some certain and consistent *principles* in the work of judicial interpretation. Every competent lawyer will recognize the imperfection which I am describing, and can supply numerous additional instances from his own study. Without attempting to follow any definite order, I shall give a few illustrations selected indiscriminately from different portions of the Code.

In the title on partnership a most important rule is thus given : " § 2444.* Any one permitting himself to be represented as a partner, is liable, as such, to third persons to whom such *representation is communicated*, and who, on the faith thereof, gives credit to the partnership." The phrase, "is communicated," in this section is new, and the meaning of it, as a legal term, is unknown. It creates a grave doubt whether the previous rule on the subject has not been materially changed by this provision. The common law rule was well settled, that a person who permitted himself to be represented as a partner, is liable to a third person, who was *aware* of such representation, who *knew* of it, and who, on the faith of it, gave credit to the firm. It made no difference how such third person obtained his knowledge, whether directly or indirectly, whether by his own observation, or from others ; and the fact of such knowledge might be inferred from circum-

* Sec. 1972 of Proposed Civil Code of N. Y.

stances.* In formulating the rule, it is not necessary to expressly state the requisites of knowledge possessed by the creditor, for this is necessarily included in the requisite that he must give credit *on the faith* of such representation. Now the word "communicated" is a word of narrow and special meaning. Taken in any proper sense, it excludes every case of mere negative and passive reception by the creditor, and is limited to the case of affirmative action by a third person in conveying information to the creditor. "Communicate" necessarily implies affirmative action, by a third person, towards the creditor. The only definitions given by Worcester, which could possibly apply are, "to give to others as partakers;" "to impart as a possession;" "to make known;" "to reveal;" "to disclose." The definitions given by a recent English dictionary, of high authority, are, "to impart;" "to reveal;" "to bestow." All these meanings are completely active. It is not my purpose to discuss, much less to settle, the true interpretation of this section. It is enough that by employing this unusual word, the authors of the Code have made it extremely doubtful whether a most important and well settled rule of law has not been materially changed, without any adequate motive for such change. This criticism is not theoretical and verbal. In my own experience, I have invariably found among my ablest, most advanced and best read students, and among intelligent members of the bar, with whom I have conversed, two diametrically opposite opinions as to the legal meaning of this section. In the single case of retiring partners the liability is definitely fixed by § 2453; but in all other cases embraced by § 2444 the liability must be uncertain until the meaning and effect of the section are settled by judicial interpretation. The section is open to another, though less important criticism. As the common law doctrine has been stated

* See modes of stating the doctrine in the preceding foot note. The rule is thus accurately laid down in a recent case: "Where a man holds himself out as a partner, or allows others to do it, he is then properly estopped from denying the character he has assumed, and upon the faith of which creditors *may be presumed to have acted*."

by judges and text-writers, the term "hold out," "holding out," has invariably been used, and has acquired a precise meaning, and is most expressive. No other words can better express the fact intended to be described. I do not think the word "represented" is any improvement over the familiar term "held out;" although I do not claim that that is any real uncertainty as to their having substantially the same meaning in such a context.

While considering this title on partnership I will briefly mention another uncertainty, although it belongs, perhaps, to a different class of defects which are subsequently described. The rule was settled at an early day that a person not in reality a partner who, by agreement, shared or was entitled to a share in the profits of a concern, became thereby liable as a partner to all creditors of the concern who became such while he was thus sharing, although the fact of his so sharing might not have been known to them when they gave the credit.* This rule has been reaffirmed by the English judges from Lord Eldon down to a very recent date. It has been generally, if not universally, followed by the American Courts, and it has been laid down by text writers as settled law. Nevertheless, judges have frequently expressed their dissatisfaction with the reasons upon which it was based, and have refused to enlarge its scope, and have carefully restricted it to the case where a person is entitled to a share of the profits as profits, so that he could compel an accounting. A few years ago the rule, for the first time, came before the English House of Lords, and by that tribunal it was overturned and repudiated.† The fact that such an important rule of the law, established for a hundred years, should be thus abrogated by the Appellate Court created much comment both in England and in this country. The decision of the House of Lords has been followed by a few of the American Courts, but has been tacitly or openly rejected in many of the States. It is certain that no other rule connected with

* The leading cases, settling this doctrine, were *Waugh v. Carver*, 2 H. Bl., 235, and *Grace v. Smith*, 2 W. Bl., 998.

† The celebrated case of *Cox v. Hickman*, 8 H. L. Cas., 268.

partnership has occasioned so much discussion, or has given rise to so many decisions as this one; and few others are of more practical importance in the daily affairs of business. Yet this rule is nowhere mentioned, nor even alluded to by the Civil Code. The most that can be said is, that by the force of the general negative language of § 2445, taken in connection with the preceding § 2444, this rule may have been abolished; but whether it is thus abrogated, or whether it still remains as a part of the common law not included within the provisions of the Code, must remain uncertain until the question is authoritatively determined by judicial interpretation.

I pass to the title on agency. By some of the old books agents have been divided into "special" and "general." It has been abundantly shown by modern text writers and judges of the highest authority, ability and learning that this classification of agents is without any foundation of fact or in law, and is misleading and useless. It is misleading, because it does not conform to the real facts, and tends to withdraw attention from the true distinctions. It is useless, because there is absolutely not a single rule of law which is based upon, or is derived from, or depends on this classification.* The authors of the Civil Code have, in § 2297,† expressly adopted this mode of classification, and have divided all agents into "special" and "general." What agents are included in the definition of "special" is left very doubtful, from the use of the indefinite word "transaction;" but it is still more uncertain whether the classification can have any influence or effect upon the true interpretation of the whole title concerning agency. It does not appear that these two classes create any distinction whatever in the general or special rules controlling the various relations arising from agency; nor that there is any difference in the application of these rules to the one class or to the other.

* My limits will not allow me to enter upon a discussion of this statement. I will only refer, in corroboration of the text, to the most admirable and convincing remarks on the subject by the editors of *The American Leading Cases*, Vol 1, p. 680, and to the opinion of Judge Comstock, in the great case of *Mechanics' Bank v. N. Y. & N. H. R. R.*, 13 N. Y., 599, 632.

† Sec. 1772 of Proposed Civil Code of N. Y.

In continuation of the subject under examination, I shall add a few more illustrations to those contained in the last pages. In the law of agency, as it has been settled by judicial decision, and formulated by the ablest text writers, the fundamental distinction is that which has been established between "express" authority, and "implied" authority of the agent. This distinction runs through the entire law on the subject. It is not too much to say, that nearly all the important rules which distinguish agency from other business transactions, which determine the relations subsisting between the third persons and the principals, or between them and the agents, and which fix the rights and liabilities of all these parties, flow directly from this fundamental division of authority into "express" and "implied." These two terms, "express" and "implied," have been used by courts and text writers without exception, and no words of legal nomenclature have become more familiar, not only to lawyers and judges, but to business men generally. Their meaning has been made clear and certain by a long and uninterrupted line of decisions, English and American; and, as a result, the rules of law involving or flowing from them are equally clear and certain. Furthermore, the distinction is a natural and necessary one; it exists in the very nature of things; and the rules derived from it are eminently just, wise and equitable. The whole doctrine of "implied" authority, in particular, in all its reasons, consequences and results, is an application of the most beneficent principle of equitable estoppel.* The authors of the civil code, most unnecessarily, and, in my opinion, most unwisely, have abandoned this distinction and nomenclature. Nowhere in the title on agency do they mention "express" or "implied" agency or authority. Instead thereof, they have adopted the hitherto unknown, uncertain, and, as yet, unmeaning† terms, "actual" and

* Upon the whole subject of "express" and "implied" authority, see the most admirable observations of the editors of the "American Leading Cases," in vol. 1, pp. 680-699.

† *i. e.*, having no definite, authoritative legal meaning.

"ostensible." The important sections are the following :
 "§ 2298*—An agency is either actual or ostensible. § 2299†
 —An agency is actual where the agent is really employed
 by the principal.‡ § 2300 ||—An agency is ostensible where
 the principal intentionally, or by want of ordinary care,
 causes a third person to believe another to be his agent
 who is not really employed by him."¶ Subsequently,
 under the head of authority, they say: "§ 2315**—An
 agent has such authority as the principal actually or
 ostensibly confers upon him. § 2316††—Actual authority is
 such as a principal intentionally confers upon the agent,
 or intentionally, or by want of ordinary care, allows the
 agent to believe himself to possess. § 2317‡‡—Ostensible
 authority is such as a principal, intentionally, or by want
 of ordinary care, causes or allows a third person to believe
 the agent to possess."

It would be easy to point out the imperfections, inaccuracies and discrepancies of these provisions considered as substantive rules of law; ||| but it is my purpose, at present, only to illustrate the uncertainty resulting from the substitution of a new and indefinite nomenclature in place of one which was familiar and definite. It is very plain that the code definitions of "actual" and "ostensible" agency or authority do not *appear* to agree with the

* Sec. 1773 of Proposed Civil Code of N. Y.

† Sec. 1774 of Proposed Civil Code of N. Y.

‡ The entire want of precision and accuracy in this, as a *legal* definition, is apparent on the slightest examination. An attorney-at-law, a factor, a broker, is *really employed* by his principal, and yet he may have, and ordinarily will have, a much larger *implied* authority to act and bind his principal than that expressly conferred, from the very nature of his business. A merchant's clerk is *really employed* by his principal, and yet he may have a much broader implied authority than that expressly conferred upon him, arising from the principal's mode of holding him out to the world. The section thus lacks the essential elements of a legal definition.

|| Sec. 1775 of Proposed Civil Code of N. Y.

¶ This is open to the same criticism. An agent who is *really* employed by a principal, may have a larger implied authority than that expressly conferred. But it is not my purpose to examine the correctness or expediency of the rules contained in the Code.

** Sec. 1791 of Proposed Civil Code of N. Y.

†† Sec. 1792 of Proposed Civil Code of N. Y.

‡‡ Sec. 1793 of Proposed Civil Code of N. Y.

||| For example, the definitions of "actual" and "ostensible" *agency* in §§ 2299, 2300, do not well harmonize with the definitions of "actual" and "ostensible" *authority* in §§ 2316, 2317.

well settled definitions of "express" and "implied" authority as uniformly given by the ablest judges and text writers. The definition of "actual" authority in § 2316* appears to depart from the usual definition of "express" authority; while that of "ostensible" authority in § 2317,† seems to differ more widely from the ordinary modes of defining "implied" authority. The very essence of "express" authority, according to the ablest judges and writers, is the *intention* of the principal to confer it;‡ and all of the well-settled rules concerning the power of an agent to bind his principal *by virtue of an express authority*, are necessarily derived from this essential conception. The definition of "actual" authority in § 2316|| seems, when taken literally, to include most cases of "express" authority under the common law, and also some instance of "implied" authority; while the definition of "ostensible" authority, in § 2317,¶ seems in like manner to cover most cases of "implied" authority, together with some instances of what would be "express" authority at the common law. I do not mean that such an interpretation must *necessarily* be given to the sections; but I maintain that the new terms introduced by the author of the code have thrown this whole branch of the law into a condition of uncertainty which can only be removed by judicial interpretation. Unless the courts shall boldly adopt and rigidly follow the principles of interpretation hereafter to be stated, all the settled rules of the law which have resulted from the doctrines of "express" and "implied" authority of agents, must be reconstructed and formulated upon the basis of the definitions contained in the language of §§ 2316** and 2317,†† and this process would require a long series of decisions and several years of time; until it was accomplished, these rules would be in a condition of doubt and uncertainty.

* Sec. 1792 of Proposed Civil Code of N. Y.

† Sec. 1793 of Proposed Civil Code of N. Y.

‡ Sec. 1, Am. Lead. Cases, pp. 680-688, note of the editors.

|| Sec. 1792 of Proposed Civil Code of N. Y.

¶ Sec. 1793 of Proposed Civil Code of N. Y.

** Sec. 1792 of Proposed Civil Code of N. Y.

†† Sec. 1793 of Proposed Civil Code of N. Y.

The essential conception of a "trust," as a word of legal nomenclature, and as defined by courts and text-writers of the highest authority, assumes not only a confidential *relation* between two persons, but also some specific thing—land, chattel, money—as the subject matter of such relation, and two co-existing estates in this same subject matter, the one legal held by the trustee, the other equitable, held by the beneficiary. All the distinctive rules of law and of equity concerning "trusts" are based upon these essential elements of the peculiar legal conception, namely, the confidential relation, the subject matter, and the two co-existing estates therein. It is true that the term has often been improperly extended, by analogy or metaphor, to cases where there was only the confidential relation and a subject matter, without the two co-existing estates,* but it has never been so extended to cases where there was only a confidential relation between two persons. The ablest modern judges, English and American, have endeavored to restrain all such extension of the term by analogy, and to restrict the use of the word to those cases where all of its essential elements were found. Nothing more tends to produce confusion and uncertainty in legal rules, than the use of fundamental terms in improper senses. The authors of the civil code in their definition of "trust" have totally ignored the essential elements of a specific subject matter over which the relation extends, and of the two co-existing estates in that subject matter, and have made it to depend alone upon the existence of a confidential relation between two persons. Without any authority whatever, they have defined "trust" so that it includes the obligation between an attorney and his client, an agent and his principal, one partner and his copartners, and the like, as well as cases of true and proper trusts.†

It is, of course, entirely uncertain how much effect will be given to this definition by the courts, in their work of

* As, for example, to a guardian and ward, where the guardian really had no *estate* in the ward's property. Many other instances readily occur to the professional reader.

† Civil Code, §§ 2216, 2217, 2219.

interpretation. If the definition should be interpreted literally, and if the meaning thus given to it should be followed in all its logical results, the whole grand department of equity relating to trusts must necessarily be modified, if not reconstructed. Again, by the consent of all text writers, and by the unanimous authority of decided cases, trusts have been divided into the two main classes of "express," created by the direct act of parties, and "implied," or "arising by operation of law." The latter class has been subdivided into "resulting" and "constructive." These terms have become most familiar; their meaning has been most accurately and certainly determined; and the most important doctrines and rules of equity concerning trusts, recognize, involve, and grow out of this settled classification and nomenclature. Without any good reason, and without gaining anything in precision of thought or of definition, the authors of the code have abandoned these well-known terms, and have introduced the two classes of "voluntary" and "involuntary," into which, they declare, all trusts are separated.* Some of these definitions are so very broad that, if taken literally, they would greatly enlarge the scope of equity jurisdiction beyond its limits as hitherto settled.†

* Civil Code, §§ 2215, 2216, 2217, 2219, 2224¹. It is true that in the various sections of the previous title on trusts of real property (§§ 847-871), the words "express," "implied," and "resulting," are *incidentally* used; but they are nowhere defined, nor is it stated when an "implied" or a "resulting" trust will arise. But in the title, concerning trusts in general, these familiar terms are not found. Of course, the positive provisions of this latter title control the incidental expressions of the previous title, which deals only with one species of trusts.

† For example: "§ 2224²—One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or *other wrongful act*, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it." This language is so broad that, if interpreted literally, it *imperatively* converts every one, who wrongfully converts a chattel, or a sum of money, and every one who wrongfully takes and carries away a chattel, or sum of money, into a constructive trustee; and thus brings every ordinary wrongful conversion of chattels or money, and every ordinary trespass, by taking and carrying away chattels or money, within the equitable jurisdiction over trusts and trustees. I do not suppose that the courts will adopt the literal interpretation, which would give such an enormous extension to the jurisdiction of equity. But this provision furnishes a striking illustration of the truth that, *in some particular sections* of the code, the courts *must, of necessity*, follow the general principles of interpretation, which I shall advocate; my contention will be, that they should follow the same general principles throughout the entire code.

¹ Secs. 1680, 1681, 1682, 1684, 1689 of Proposed Civil Code of N. Y.

² Sec. 1689 of Proposed Civil Code of N. Y.

In the law as to negotiable instruments, all kinds of endorsements have been separated into the two general classes or forms of endorsements "in blank," and endorsements "in full." These two terms have long been used by all American and English judges, and by all text writers. They even belong to the legal nomenclature of other commercial nations, and are used wherever commerce and mercantile business is carried on. They are so well known, *that they are not confined to the nomenclature of the legal profession, but are familiar to all intelligent business men, and are universally used in the every-day transactions of life.* The meaning of these terms has been settled with absolute certainty; and all the rules of the law connected with endorsements have been established by the courts, and formulated by the text writers, with reference to them. Yet the authors of the civil code have rejected these well-known mercantile terms, and have introduced the new and inappropriate names "general" and "special" to designate the classes of endorsements.† Even if this change in nomenclature is not likely to produce any important modifications in the law, there *must* be more or less uncertainty in the judicial adaptation of settled rules to these new terms. There are several provisions in the title concerning negotiable paper, the full meaning, scope, and effect of which can only be determined by a progressive course of judicial decision.‡ One

* I have no doubt that if the intelligent merchants, and the bank cashiers and tellers, of San Francisco, should be asked—What are "general," and what are "special" endorsements?—few of them would understand what was meant, or be able to give a correct answer. An endorsement "in blank" or "in full," they would all know.

† Civil code, §§ 3111, 3112, 3113¹. These names are inappropriate. The term "special" is certainly more proper to designate a class of endorsements which are peculiar and uncommon in form,—such as those often called "restrictive," (*e. g.*, an endorsement "without recourse," or for collection, and the like),—rather than a class which are in most common and every day use.

‡‡ While my limits will not permit any examination of these, I will mention one of them, which is somewhat curious. The civil code defines endorser and endorsement as follows: "One who writes his name upon a negotiable instrument, otherwise than as a maker or acceptor, and delivers it with his name thereon to another person, is called an endorser, and his act is called an endorsement²." It will be

¹ Secs. 2753, 2754, 2755 of Proposed Civil Code of N. Y.

² Sec. 2750 of Proposed Civil Code of N. Y.

or two of these will be mentioned as illustrations of another peculiar characteristic of the civil code which, perhaps even more imperatively than the one now under consideration, demands a fixed, uniform, and consistent principle of interpretation applied to the code as a whole. The characteristic alluded to will be described in the next pages.

I have thus given some striking instances of the uncertainty which must result from the adoption of new phraseology in the place of that which was familiar and settled in its meaning and effect. These few instances must suffice for the purpose of illustration, although they are far from exhaustive. Departures from the customary and settled terminology and phrases, more or less important, occur in a large number of definitions and statements of doctrines. They consist sometimes in a single word sometimes in a clause, and sometimes in an entire provision. They must produce, in a greater or less degree, an uncertainty as to the real intent of the legislation, and must require, therefore, the aid of judicial interpretation in order to fix their true meaning and effect. Every intelligent lawyer, familiar with the common law rules as embodied in decisions and text-books, will readily recognize these instances in his private study of the code.

I shall, in the following pages, briefly describe another characteristic feature of the code which requires the aid of

noticed that this definition does not require that the writing and delivery "should be with the intent thereby to become an endorser," or the like. Taking this section literally, according to the plain meaning of its language, one who writes on the back of a note the words, "I hereby, for value received, guaranty the payment of the within note," and signs his name under the writing, and then delivers the note, is an endorser, and his name is an endorsement. The language of the section is not, and cannot be, confined to cases where a person simply writes his name and nothing more; the two excepted cases show this; and these are well known forms of endorsement, which consist of more than the name; and to confine the language in this manner would necessarily restrict the entire section to the single form of endorsement in blank. No doubt other provisions of the code define the liabilities of a guarantor as being quite different from those of an endorser; but still this statutory definition of endorser and endorsement is so framed that, unless the courts disregard its positive language, and interpolate a broad exception into it, it makes a guarantor of a note or bill to be an endorser, and the signature of a guarantor to be an endorsement. Doubtless, the authors of the code intended no such result, but it comes from their neglecting the familiar and certain modes of stating legal rules, and adopting a phraseology hitherto unused.

judicial interpretation in every important part, and shall then be in a position to discuss the principles of interpretation which ought to be followed in order that the benefits of codification may be realized by the citizens of California from their system of legislation.

In considering the language of the civil code, the fact must be constantly remembered that it does not purport to embody in a statutory form all of the existing rules of the law upon any subject whatsoever. It contains only general definitions, the statements of general doctrines, and a very few special rules. The great mass of the special rules of the law, applicable to particular circumstances, may be to some extent inferences from the doctrines which *are* formulated, but they are certainly not expressed in the text of the code. There must always, therefore, be more or less uncertainty as to which of these special rules are contained in and implied by the more general provisions of the code, and what of them must be sought for by the courts, independently of the code, in reported decisions, text-books, and other common law authorities. I shall have occasion to dwell more at large upon this feature of the code while discussing the true principles of its interpretation; I mention it now for its general bearing upon the language and modes of expression which the authors of the code have adopted, and especially upon the source of doubt and uncertainty inherent in much of their language and forms of expression which I am about to describe.

The second main source of doubt and uncertainty with respect to the true and full meaning and effect of individual provisions, is found in what I may call—to express the thought in one word—the extreme *condensation* of language uniformly employed by its authors. This peculiar characteristic, so unlike the best English types of codification, runs through the entire legislation. The authors of the code seem to have *struggled* to express doctrines and rules in the fewest possible words, and they have thus left it often very doubtful *what* doctrines and rules they intended to state. As a rule, they give no am-

plifications, explanations, examples, illustrations; their doctrines and rules are laid down in the most abstract manner, and in the most concise and condensed form of words, important and independent doctrines being frequently expressed only in the separate clauses, or parts of a clause, which constitute portions of single section. One necessary consequence of this extreme conciseness and brevity is, that matters of the greatest importance are constantly left as inferences, and often as doubtful inferences, which might much easier and better have been expressed in the text as additional rules. Even if the court succeeds in drawing the correct inference, and thus determines the true rule, the necessity for such work of judicial interpretation might readily have been obviated by incorporating the inference in the text as a separate rule. In many cases, the court will have great difficulty in drawing the correct inference as intended by the legislature, and may sometimes reach a wrong conclusion. All this element of doubt, uncertainty, and possible or even probable error might have been completely removed by making the provisions of the code fuller, more detailed, explicit and explanatory.*

* A striking illustration of my position is found in the instance mentioned in a previous page, as to the uncertainty concerning the full meaning of certain sections in the title on partnership. See *ante*, p. 21.

I there mentioned the fact that the civil code nowhere expressly alluded to the well settled common law rule concerning the liability to third persons, as though he were a partner, of one who receives a portion of the profits. I said that perhaps § 2445, taken in connection with § 2444, abrogated this old rule; but whether it did so or not was an uncertain inference which could only be established by judicial interpretation. The corresponding sections in the proposed New York civil code, from which ours is so largely borrowed, are §§ 1309 and 1310, and are identical word for word with §§ 2444 and 2445 in our civil code. The New York commissioners append to their proposed §§ 1309-1310, the following note: "A peculiar rule has long been established at common law, by which any one receiving, or voluntarily acquiring a right to receive, a share of the net profits of a partnership business, is liable to third person as a partner, whether they were aware of the fact or not (citing cases). But this rule is most earnestly condemned by the best writers on the subject (citing Story, and Lindley); and has been declared to be a bad rule by eminent judges (citing Cox v. Hickman and other English cases). The commissioners therefore recommend the abolition of the rule." The New York codifiers there assume that the rule is abolished by their sections. Assuming this to be so, it would have been far better, easier, for them to have definitely expressed this conclusion by inserting a suitable provision in the text of the code; such provision would have occupied much less space than their note does. But the inference which they thus assume is far from absolutely certain. It is well settled, that the intention of the authors of a statute,

Another necessary consequence of the extreme conciseness is, that it destroys one of the chief excellencies or benefits claimed for the system of codification. Perhaps the most important and peculiar excellency of codification, as claimed by the ablest advocates of this system is, that a code will remove the law from the special and technical knowledge of a single instructed class of lawyers and judges, and will bring it within the comprehension and knowledge of all classes of citizens who possess an average intelligence. The law of a state, as it now is, scattered through innumerable decisions and statutes, is known and can be known and understood, only by a small number of professional men who must pass their lives in its study. A code, it is said, will destroy this monopoly of knowledge, and will bring the rules of the law within the easy cognizance of all ordinarily intelligent laymen. This supreme advantage of a code is constantly asserted by the advocates of codification; and if such a result were accomplished it would certainly be an incalculable gain to the whole people of a State. Whatever may be true of an ideal code, it cannot be denied that the peculiar characteristic of our civil code, which I am describing, has completely prevented or destroyed this benefit. Our civil code, from beginning to end, assumes on the part of the reader, whether he be lawyer, judge or layman, a full and accurate knowledge of the pre-existing common law.* It is not too much to say that there is hardly a definition or a statement of doctrine in the whole work the full meaning, force and effect of which can be apprehended or understood without a previous *accurate* knowledge of the common law doctrines and rules on the same subject matter. The case is even still stronger. In many very important provisions the reader would be completely misled,

as to the meaning of a particular provision, is never binding upon the courts. The legislature may have had a different intention. The courts must always find the intention of the legislature in the language of the statute itself. The expressed intention of those who draw up the statute, is at most only a help; it is never obligatory upon courts. Similar examples might be multiplied from all parts of the civil code.

* The necessary effect of this most striking and distinctive feature upon the mode of interpreting the code will be discussed in the sequel.

and would reach the most erroneous conclusions as to the true meaning and effect, without such previous and accurate knowledge. Examples might easily be multiplied, but, simply for purposes of illustration, I will mention two which occur at the very commencement of the code, namely, the provisions concerning defamation, libel and slander, and those concerning the contracts of infants.*

To return from this digression. I said above that the authors of the code seem to have struggled to express doctrines in the fewest possible words to such a degree that they have often left it doubtful which doctrine they intended to state. Wherever there are several distinct rules belonging to or connected with the same subject

* Civil Code, §§ 44-48¹ (defamation); §§ 33-36² (infant's contracts). A person, no matter how great his general intelligence, who was entirely ignorant of the settled common law rules as to libel and slander, could hardly derive any definite meaning from reading these sections; he would hardly even understand what subject they related to, and whatever impressions he might form as to the actual rules of the law would, of necessity, be imperfect and erroneous. The most distinctive and essential element of the legal conception, malice, is not only not defined, but it is not even alluded to in the definitions of libel and of slander; and it is only incidentally mentioned in the definition of "privileged communication." No one ignorant of the pre-existing law would suppose from reading § 47 that there were two entirely distinct classes of "privileged communications," producing entirely different effects upon the liabilities of the parties. The sections relating to infants' contracts, §§ 33-36, are subject to similar observations. I may be permitted to add that in my work as an instructor this peculiarity of the civil code has been strongly forced upon my attention. In France, Italy and Germany, where the entire jurisprudence of the State is embodied in codes, not only are all the important text books and treatises for the use of lawyers composed in the form of commentaries upon the text either of the entire code or of some definite portion of it, but the instruction upon the municipal law of the country given to the students in all the universities by the faculties of the law is based directly upon the text of the code. In other words, the code is the principal text book on the municipal law in the hands of the students; and the professor, in his lectures, discusses, explains and comments upon the provisions of its text in their regular order. In like manner the instruction in the Roman law consists chiefly in lectures based upon the text of Justinian's institutes. Such a method would simply be impossible in California. To use the civil code in our law school as the preliminary and elementary text book, and to have the instruction upon its text, would produce most imperfect and erroneous results. Attempts to pursue this mode have utterly failed. Experience shows that the only practicable method of the student's obtaining an accurate notice of what the law of the State *now* is on any particular subject, agency, sales, negotiable instruments, etc., etc., is by instruction first in the settled common law doctrines and rules, by the study of decisions and text books, and they are then in a position to enquire and to ascertain, as far as possible, how far the civil code has altered, abrogated, supplemented or simply declared these doctrines and rules of the pre-existing law. This method is necessary, partly from the fact that the civil code does not purport to embody the entire civil jurisprudence of the State, but chiefly from the peculiar characteristic of its composition described in the text.

¹ Secs. 30-34 of Proposed Civil Code of N.Y.

² Secs. 16-19 of Proposed Civil Code of N. Y.

matter, each applicable to somewhat different conditions of fact, but all closely related together by some common bond, clearness, precision and certainty would seem to require that such rules should *always* be stated separately, distinctly and fully, and that, *generally*, even if not always, each should constitute a separate section or paragraph. The authors of the code have pursued a different policy. Almost without exception, I may say, under such circumstances, they have condensed all these rules into one section—very often consisting of a single long and involved sentence—so framed that each particular rule is embodied in a single subdivision, or even a single clause, of that section. In such a case the grammatical meaning and effect of each clause or subdivision can only be determined from the construction of all the other clauses, and of the entire section; and hence it necessarily results that the legal meaning and effect of the rule embodied in a single clause or subdivision is involved in that of all the others; the relations between the different parts are obscured; it is difficult to determine the full import of each in connection with the others; and more or less uncertainty arises as to all the group of legal rules intended to be formulated in the entire section.* Instances will readily occur to every intelligent lawyer; for this mode of formulating legal rules is *the peculiar characteristic* of the entire code, and must have been consciously and intentionally adopted by its authors.† It will be sufficient, therefore, for my present purpose, to give a few illustrations. The relations of a surety to his creditor and his principal debtor depend upon principles which were originally purely equitable. One of the most important questions belonging to this subject is: How far the liability of the surety, under a contract of suretyship, originally valid, may be discharged, and the surety

* I have thus described, what is generally the fact, several distinct rules as condensed into *one* section. Occasionally the same method extends to two or three sections closely connected. The same observations apply to these instances.

† Indeed, this feature has not only been admitted, but has been openly commended by some advocates of the New York code in the controversy which has been carried on in that State during the past two or three years.

thereby exonerated, by the conduct, acts or omissions of the creditor, without the consent of the surety. This question finally depends upon the fundamental equity, or equitable rights of the surety as against his principal debtor, with which the creditor is not permitted to interfere. In applying this principle courts of equity, and after them courts of law, have, through a long series of decisions, established a number of distinct doctrines or rules. These rules have been developed out of the single general principle, but they are still separate, distinct, independent, applicable to different conditions of fact, and numerous. Their discussion runs through a multitude of decisions, and occupies a large space in every text book, dealing with the subject. They cannot be stated, and understood, without much explanation and illustration; and their accurate statement necessarily involves careful and often refined distinctions. The authors of the Code have endeavored to condense the general principle, and all the particular doctrines and rules, arising from it, into one short section containing three brief subdivisions; although they have added a further section, apparently applicable to one state of circumstances. It is no part of my present purpose to criticise the language of any of the provisions cited by way of illustration; but I do not hesitate to say, that any person reading these sections would hardly understand their purport, much less appreciate their full meaning, unless he was already familiar with the settled doctrines of equity concerning the subject matter. Certainly, the full meaning, force, and effect of these sections can only be determined by an elaborate judicial interpretation.* Another

* Civil Code, § 2840¹, and see § 2845². I will mention one particular uncertainty connected with these sections, and especially with § 2845². It is well known to every intelligent lawyer that a peculiar rule affecting the liability of sureties was originally settled by the New York Courts, and has since been followed by the Courts of a few other States. The rule is as follows: "If, after the liability of the principal debtor and of the surety becomes due and payable, the surety makes an express demand upon the creditor that he proceed at once to enforce his claim against the principal debtor, and the principal debtor is at that

¹ Sec. 2459 of Proposed Civil Code of N. Y.

² Sec. 2466 of Proposed Civil Code of N. Y.

example of this extreme condensation is found in the chapter on "guaranty," where the numerous rules concerning agreements, which are apparently collateral, but which are really original, and which, therefore, need not be expressed in writing, are all embraced in a single section. The language of this section is so exceedingly concise that several most important and entirely independent rules are stated each in a single clause of one subdivision.*

It will be proper to add a few illustrations to those given at the close of the preceding pages. The common law rule is well settled that, where an act done by an assumed agent is of such a kind that the law requires the agent's authority to be conferred in some particular manner, as by a writing, or by a sealed instrument, the act, when done without antecedent authority can, in general, only be ratified by the same sort of proceeding or in the same kind of mode as would be necessary, by the law, to confer a previous authority. Thus, whenever antecedent authority to

time solvent, so that the claim might be collected from him, but the creditor refuses, or neglects, or delays to comply with the demand thus made upon him, and in the meantime and pending such delay by the creditor, the principal debtor becomes insolvent, so that the claim is really lost as against him, the surety is thereby discharged from all liability." See *King v. Baldwin*, 17 N. Y., 384. This rule, often called the New York rule, is rejected by the English Courts, and by the Courts in a majority of the American States. It is confessedly opposed to the fundamental principle which controls the relation between the surety and the creditor and the principal debtor. It was directly and most expressly rejected by the Supreme Court of California in *Dane v. Corduan*, 24 Cal., 157. The very able opinion in this case reviews all the New York decisions, and those of other States which sustain the rules and directly overrule them all. The sections of the Civil Code cited above do not expressly establish this rule, and it is very doubtful whether they impliedly establish it. Section 2,845 is easily susceptible of an interpretation by which it simply enacts the familiar equitable doctrine that a surety may, by a suit in equity, require the creditor to prosecute the principal debtor. At all events, judicial interpretation is necessary to ascertain their full meaning and effect.

* Civil Code, § 2794.¹ A very large number of decisions must be examined, even to show the object and meaning of this section. The authors of the Code have adopted very misleading language in the first clause of this section. They say: "A promise to answer *for the obligation of another*, in any of the following cases, is deemed an original obligation of the promisor, and need not be in writing." In fact, all of the rules embraced in the succeeding subdivisions of this section were established by the Courts as common law rules, upon the express ground that the promise was *not* to answer for the obligation of another, and was therefore *not* a collateral undertaking at all.

¹ Sec. 2407 of Proposed Civil Code of N. Y.

do a certain act can only be conferred by a writing or a deed, such act, if unauthorized, can only be ratified by a writing or by an instrument under seal. This general common law rule is subject to one most important limitation. It applies only in those cases where the ratification would operate *as an assent* by the assumed principal; that is, where the ratification was either expressed by words, or was implied from such acts as indicate assent merely without anything more. It does not apply where the ratification operates *by way of estoppel*, where the assumed principal not merely indicates his assent, but does something which estops him from denying the authority of his assumed agent. This might happen when the ratification is implied from the principal's receiving and retaining the proceeds and benefits of the assumed agent's act after full knowledge of all the facts.* The civil code leaves it very doubtful whether this latter most just and righteous rule of the common law is not abrogated. The whole subject of ratification is dealt with in five short sections.† The first of these is a striking illustration of the concise mode of expression described in the preceding article, and reads as follows: "A ratification can be made only in the manner that would have been necessary to confer an original authority for the act ratified, or where an oral authorization would suffice, by accepting or retaining the benefit of the act with notice thereof."‡

* See editor's note, 1 Am. Lead. Cas., pp. 717-721.

† Civil Code, §§ 2310-2314. (Secs. 1786 to 1790 of Proposed Civil Code of N. Y.)

‡ Ibid, § 2310.¹ This whole section is certainly most careless in its mode of expression. Read strictly according to its grammatical construction, it says, "that where an oral authorization would suffice, a ratification can *only* be made by accepting or retaining the benefit of the act, after notice thereof;"—since the word *only*, by a strict grammatical construction, necessarily limits the second clause of the section as well as the first. No such absurd conclusion, however, can for a moment be permitted by the courts. They would certainly hold that the second clause simply means "that when an oral authorization would suffice, one of the modes of ratification may be by accepting or retaining the benefit of the act, after notice thereof." Of course, when an oral authority would suffice, the ratification *may* be by express *verbal* language, or by express written language, or by acts other than accepting or retaining the benefit of the act, according to the circumstances; and it cannot be possible that the legislature meant to change *this* con-

¹ Sec. 1786 of Proposed Civil Code of N. Y.

The sections of the code defining fraud furnish another illustration of the uncertainty, ambiguity, and imperfection resulting from this extreme conciseness and brevity of statement, this attempt to condense several different, although related, doctrines within the limits of a single formula or proposition. Fraud is regarded from different points of view by law and by equity. In law, an actual intent to deceive, a knowledge of the falsity—the *scienter*—is an indispensable element of the conception. There is no “constructive fraud” at law. In equity such actual intent to deceive and knowledge of the falsity are not always essential. Acting upon the principle of good faith, courts of equity have determined several independent species of either actual or constructive fraud, which would not be fraud at law.* Actual fraud both at law and in equity consists either in representations or in concealments. It is settled in equity as well as in law, that the intentional concealment of even a material fact known to a party, is not fraud, unless there was some duty, arising either out of his prior relations or from the circumstances of the transaction itself, resting upon said party to disclose. Mere concealment, with nothing else, is not fraud.† The civil code draws no distinction between fraud at law and in equity; it is utterly silent upon any such distinction. Its language is universal, and ignores the existence of any difference between law and equity. In the title on contracts, in the chapter upon “Consent,” it declares that fraud is either actual or constructive.‡ It then defines “actual fraud,” by a very abstract and concise mode of

mon law rule. The first clause of the section may have abrogated the other branch of the common law doctrine concerning ratification by estoppel, mentioned in the text. There was no good reason for this alteration; on the contrary, the plainest considerations of justice require that the entire common law doctrine should be retained. The section at least shows that a strictly literal interpretation of the civil code is not always possible.

* Without attempting any description of these various species, I may be permitted to refer to my work on equity where they are fully described; see 2, Pomeroy on Eq., §§ 874, 875, 884 (at law), 885-888 (forms of actual fraud in equity), 922, 923 (nature and kinds of constructive fraud in equity).

Without discussing this proposition I refer to 2 Pomeroy on Eq., §§ 901, 902 and cases cited.

† Civil Code, §1571. (Sec. 986 of Proposed Civil Code of N. Y.)

expression, in a section containing five subdivisions, and describing five distinct species of fraud.*

While the authors of the code, in these subdivisions, seem to have in mind, and to be describing, the various forms of fraud as they exist *at law*, yet it is very remarkable that in none of the acts mentioned in these subdivisions is an *intent to deceive* made essential in order to constitute the fraud. By the language of the introductory clause of the section, any of the acts described in the five subdivisions, done by a party to the contract, with intent to deceive the other party, *or* to induce him to enter into the contract, constitute actual fraud. In other words, if the act is done in order to induce the other party to enter into the contract, although without any intent to deceive him, it is declared to be fraud. As the doctrine has heretofore been fully settled concerning fraud in connection with the making of contracts, both at law and in equity, the act (misrepresentation or concealment) must always be done for the purpose of inducing the other party to enter into the contract; and at law the act must also be done with what the law calls an intent to deceive. In other words, at law, the act must be done both with an intent to deceive, *and* also for the purpose of inducing the other party to enter into the contract.† Is it possible that the

* *Ib.*, §1572.¹ I cannot refrain from making a few observations upon this section, although it is not my main purpose to criticise the actual rules of the code. In the first place, it may be noticed that the section wholly omits the most common every-day form of fraud at law, namely, "the statement, as a fact of that which is not true, by one who at the time *knows it to be false*." It is only by inference that this most frequent form of legal fraud, which is constantly coming before the courts, can be embraced within the language of the first subdivision. In the second place, the third subdivision if *taken literally*, must work a complete change in the well-settled doctrine of both law and equity concerning fraudulent concealments. Any suppression of a fact, by a party having knowledge of it, if done in order to induce the other party to enter into the contract, even if there is no intent to deceive that party, is declared to be a fraud; the requisite that there should be a duty resting upon the party to disclose, is entirely omitted from this section. I have already mentioned the settled doctrine of law and equity that a concealment is fraud only when a duty rests upon the party to disclose. This doctrine the section in subdivision third *seems* to abrogate; for taken literally, it declares every concealment, even when there is no intent to deceive, to be a fraud.

¹ Sec. 987 of Proposed Civil Code of N. Y.

† I may refer to 2 Pomeroy on Eq., §§ 879, 880, 883, 884.

authors of the code, by merely inserting the disjunctive conjunction *or* into their definition, designed to effect such a great change in the well-settled legal doctrines concerning fraud? It is plain that the true meaning and effect of this section can only be determined by an elaborate system of judicial interpretation.

But this is not all. In a subsequent title on "obligations imposed by law," fraud is again defined under the name of "deceit." The essential elements of deceit and its legal consequences are first stated.* In this general statement, willful deceiving and an intent to mislead are made indispensable. Then follows a statement of the acts which may constitute such deceit, in a section containing four subdivisions, and describing four separate forms of deceit.† These subdivisions in some respect correspond exactly with those of the section defining actual fraud, but differ from them in other respects in a remarkable manner. Finally, in the chapter on contracts, "constructive fraud" is defined in a section containing two subdivisions.‡ It cannot possibly refer to those instances which are described by text writers upon equity under the name of "constructive fraud." As it seems to me, the authors of the code intend, by the very general and vague language of this section, to include those instances which would be regarded as fraud in equity although not so at law. Without a full and accurate knowledge of the settled doctrines concerning equitable fraud, this language would convey very little definite meaning to lawyers or judges.

* Civil code, § 1709. (Sec. 1121 of Proposed Civil Code of N. Y.)

† Civil code, § 1710.¹ Subdivisions one and four of this section are identical, word for word, with the same subdivisions of § 1572. Subdivision two, although expressed in somewhat different language, is the same in meaning with the second subdivision of § 1572.² Indeed, it states the same doctrine, as settled by the decisions, in a clearer and more simple manner. Subdivision three differs widely from the third subdivision of § 1572. It states the doctrine as to fraudulent concealment, as settled by courts of law and equity; the necessary requisite of a duty to disclose is retained. It would be simply impossible to reconcile these two subdivisions if both were interpreted literally.

¹ Sec. 1122 of Proposed Civil Code of N. Y.

² Sec. 987 of Proposed Civil Code of N. Y.

‡ *Ib.* § 1,573. (Sec. 988 of Proposed Civil Code of N. Y.)

Another illustration of ambiguity and uncertainty is found in the title on negotiable instruments. It is a familiar common law rule that a promissory note payable on demand, either with or without interest, becomes payable at once, so that a suit may be brought upon it on the day after its date without any actual demand.* It was further settled with regard to such notes that they become mature on the next day after their date, with all the consequences of such maturity. Demand of payment must be made on that day or endorsers would be discharged; a transfer after that day would be a transfer after maturity; and finally, the statute of limitations began from that day.† Similar rules were established with respect to bills payable at sight.‡ The civil code contains the following provisions concerning such demand notes: "Apparent maturity of a promissory note payable at sight or on demand, is 1. If it bears interest, one year after its date; or 2. If it does not bear interest, six months after its date.§ This

* *Haxton v. Bishop*, 3 Wend., 13.

† It is true that some cases had drawn a distinction between notes on demand without interest, and those *with* interest, and had held the latter to be continuing securities, not maturing at once; but most of these cases had been overruled; and the law as stated in the text was settled by the great weight of authority. See *Merritt v. Tod*, 23 N. Y., 28; *Payne v. Gardener*, 29 Id., 146; *Herrick v. Woolverton*, 41 Id., 581; *Hirst v. Brooks*, 50 Barb., 334.

‡ See *Mintman v. D'Equino*, 2 H. Bl., 565; *Mellish v. Rawdon*, 9 Bing., 416; *Brady v. Little Miami R. R.*, 34 Barb., 249; *Benton v. Martin*, 40 N. Y., 345.

§ Civil code, § 3135.¹ One single effect of this provision is stated in a subsequent section, namely: "§ 3248.² If a promissory note payable on demand or at sight, without interest, is not duly presented for payment within six months from its date, the endorsers thereof are exonerated, unless such presentment is excused." It is certainly very strange that no rule is given as to the effect upon the endorsers of a failure to present a demand note with interest for payment within a year from its date. The full meaning and legal effect of § 3135 can only be determined by a course of judicial interpretation. What is meant by the "apparent maturity" of such a note? Does it result from this section that no suit can be maintained on a demand note without interest until the six months from its date have elapsed, or on a demand note with interest until a year from its date has elapsed? The general rule is that no suit can be maintained upon a promissory note before it has matured. The same term "apparent maturity" is applied to all negotiable instruments, in stating the time when they become due, § 3132.³ Again, does this section prevent the statute of limitations from beginning to run on a demand note without interest, until the six months from its date have elapsed, and on a demand note with interest until the year from its date has elapsed? Finally, is a transfer of such notes, before the six months have expired, or the year has expired, as the

¹ Sec. 2785 of Proposed Civil Code of N. Y.

² Sec. 2884 of Proposed Civil Code of N. Y.

³ Sec. 2782 of Proposed Civil Code of N. Y.

section is a most striking illustration of the ambiguity and uncertainty which must arise from such general language, when it would have been so easy to have provided for the effects of such language by a few definite rules added to the text. The same ambiguity and uncertainty arise from the corresponding provisions concerning bills payable at sight, and the same observations might be made upon them.*

It is wholly unnecessary to extend these pages by multiplying such examples, especially as it is not at all my main purpose to criticise the civil code as a work of legislation. It is apparent, from the illustrations already given, that there are several important sources of ambiguity, uncertainty and possible error in the order, method, employment of legal phraseology, use of language, and concise manner of stating doctrines and rules, adopted by the authors of the code. The highest interests of the State require that these defects should be removed, and that the code should, as far as possible, be rendered clear, certain, and comprehensible, not only to judges and lawyers, but to all intelligent laymen. This result might be reached by a complete revision and reconstruction of the code itself through the labors of an able commission appointed for that purpose under the authority of the legislature. Such a reform is, at present, wholly impracticable. There

case may be, a transfer before maturity, so that the transferee may be a *bona fide* holder; and is a transfer after these times a transfer after maturity? All these questions might easily have been settled, and should have been settled by plain and unequivocal rules of the code itself. One very curious result may *possibly* follow from the judicial interpretation of this section. If it should be held that the common law rule allowing a suit on a demand note with or without interest, to be brought at any time after the day of its date, had not been changed; and if it should be further held that the statute of limitations does not begin to run on such notes until six months or a year from their date have elapsed, as the case may be, then we shall have the following strange result: A note payable *on demand* with interest is not barred until *five* years have run from its date, while a note payable *one day* after date is barred in four years and a day, a note payable in *one month* after date is barred in four years and a month. The possibility for such a strange inconsistency could easily have been obviated.

* Civil code, §§ 3134,¹ 3189,² 3213.³

¹ Sec. 2734 of Proposed Civil Code of N. Y.

² Sec. 2834 of Proposed Civil Code of N. Y.

³ Sec. 2857 of Proposed Civil Code of N. Y.

is no reason to expect *any* interference by the legislature ; and if it should interfere, there is no reason to anticipate any real improvement as the result. To reconstruct and perfect the civil code according to the highest type of codification, would require the uninterrupted labors, extending through a considerable period of time, of a commission composed of the very ablest lawyers in the State. The expense of such a commission the legislature would not incur, although it would be far less in amount than the necessary cost of judicially interpreting the present code through a long succession of decisions. The only practicable method, therefore, of removing ambiguity from the text of the code, of ascertaining the meaning of its provisions and determining their effect with certainty, is by the process of judicial interpretation.

We thus reach the final question, what principles should guide the courts, and especially the court of last resort, in this work of interpretation ? It is possible, of course, that the courts should adopt and follow no general principle whatever. If in one case depending upon a rule of law formulated in the code, the court should rest its decision wholly upon the pre-existing common law rule, without making any reference whatever to the text of the code, and should thus virtually treat that provision as being simply declaratory of the common law rule with all of its consequences and effects ; if, in another similar case, the court should rest its decision wholly and exclusively upon the very text of the code, interpreting the provision strictly according to its very letter, making no reference to the pre-existing common law rule on the subject, and should thus virtually treat the common law rule as though it never had existed, and the provisions of the code as being the first and only source of the rule ; and if in still another case the court should rest its decision both upon the text of the code and upon the pre-existing common law rule, treating the common law rule as the foundation, construing the code provision by its light, and enquiring how far, by a reasonable interpretation of its language it had altered, added to, or simply declared the common law

rule ; then the court would plainly be guided by no principle of any kind ; its work of interpretation would be conducted, if I may be permitted to use the expression, in a haphazard manner. In this manner, particular and isolated sections or clauses of the code might be interpreted ; but there would be no interpretation of the *civil code*.

It is evident that such a method, or rather absence of method, in construing the code, as last described, must inevitably work a serious injury to the jurisprudence of the State, to the administration of justice, to the rights of suitors, and the entire people of California. If it should become apparent that the courts are guided by *no* fixed system of interpretation, but are proceeding, as it were, in a haphazard course, that without any rule they construe one section in the loosest and most liberal manner, as though common law doctrines alone *governed* us, and another section in the most strict and literal manner, as though no common law doctrines had ever existed, and still another section in a moderate manner, by combining and comparing the original common law doctrine with the language of the text, and the like, then no member of the bar, however intelligent and learned, would be able to advise his clients, with any reasonable degree of certainty, as to their rights and liabilities arising under sections which had not yet been judicially interpreted, and their meaning completely determined. The utmost that any lawyer could do would be to guess, to speculate, to suggest possibilities, or perhaps probabilities. Even now the ablest lawyer constantly encounters uncertainties in advising upon the meaning and effect of particular sections and clauses of the civil code, and upon the rights and liabilities arising therefrom ; but this uncertainty would be increased tenfold by the condition which I am supposing. Indeed, the administration of justice, and the enforcement of civil rights, by means of litigations, would be turned very much, as to their practical results, into a mere game of chance. Furthermore, if the work of interpretation should go on in this manner for a number of years, until the

whole, or even a considerable portion, of the civil code had thus been judicially construed, the resulting mass of actual rules would be inconsistent, incoherent, and even contradictory. All symmetry and homogeneity would have disappeared from the jurisprudence of the State. The law would be in such a condition as to imperatively demand a complete reconstruction ; either an entire abrogation of the code, with all its superstruction of judicial interpretation, and a return to the common law, or else the enactment of a new, more elaborate, and more nearly perfect code. Dr. Johnson has described the evil effects resulting from such an uncertain condition of the law, in strong and forcible language, which well deserves quotation. He says : *

“ The advantage which humanity derives from law is this : That the law gives every man a rule of action, and prescribes a mode of conduct which shall entitle him to the support and protection of society. That the law may be a rule of action, it is necessary *that it be known* ; it is necessary that it be permanent and stable. The law is the measure of civil right ; but if the measure be changeable and unknown, the extent of the thing measured can never be settled. To permit a law to be modified at discretion, is to leave the community without law. It is to withdraw the direction of that public wisdom by which the deficiencies of private understanding are to be supplied. It is to suffer the rash and ignorant to act at discretion, and then to depend for the legality of that action on the sentence of the judge. He that is thus governed lives not by law, but by opinion ; not by a certain rule, to which he can apply his intention before he acts, but by an uncertain and variable opinion, which he can never know but after he has committed the act on which that opinion shall be passed. He lives by a law (if a law it be) which he can never know before he has offended it. To this case may be justly ap-

* Boswell's Life of Johnson, vol. 3, p. 314. (Bohn's Ed.)

plied that important principle, *misera est servitus ubi jus est aut incognitum aut vagum*.*

Reaching thus the conclusion that the courts should adopt some general, fixed, uniform principle or system of interpretation, which should be consistently pursued, and applied alike to all parts of the civil code, in determining the true meaning and intent of every particular provision, there are in fact but two *such* systems possible, and these stand in direct antagonism to each other. One of these possible systems or principles of interpretation may be

*Two additional examples of the uncertainty of the civil code were overlooked in the former pages; and as they are such striking illustrations of my remarks I shall insert them here, although out of their proper connection. In defining marriage the civil code says: "§ 55. Consent alone will not constitute marriage; it must be followed by a solemnization, or by a mutual assumption of marital rights, duties or obligations." That is, in order to constitute a valid marriage, where there is no solemnization before a clergyman, or magistrate, but only a consent (written or verbal) to be husband and wife, this consent must be followed by "a mutual assumption of marital rights, duties, or obligations." What is the meaning of this strange phrase? The law, as previously settled in this State, and as settled throughout the country, is, that a consent or agreement of the two parties to be husband and wife, followed by "consummation" or "cohabitation," was sufficient without anything else to constitute a valid marriage. The "consummation" or "cohabitation" here meant, in plain English, simply sexual intercourse, copulation, nothing more nor less. That is not only shown by numerous decisions, but it is most clearly and unmistakably expressed in the familiar maxim, "marriage is contracted *per verba in presenti cum copula*;" while the converse of this rule was also generally settled that a marriage was not contracted *per verba in futuro cum copula*. The doctrine was thus firmly established that a mutual consent, without any form or solemnization, accompanied or followed by sexual intercourse, copulation, constituted a valid marriage. No "habit" and "repute," no holding each other out to the world as husband and wife, no living together as husband and wife, were necessary in addition. In fact, in the greatest number of the decided cases which have held the parties to be in reality married in pursuance of this doctrine, the parties had never acknowledged the marriage openly; had never held each other out to the world, nor had lived as husband and wife; but on the contrary had lived *apparently* in a state of concubinage as man and mistress. Is the phrase "mutual assumption of marital rights, duties and obligations," intended as a delicate *euphemism* for "copulation," and as meaning the same thing; and is the common law rule thus left unchanged? Or, on the other hand, does this phrase mean something more than, something in addition to, copulation? And is the common law doctrine thus altered? The phrase is absolutely unknown to the law, and is so vague and indefinite that no one could even guess its meaning without the help of judicial interpretation. Does it mean that the two spouses must openly live as husband and wife, must hold each other out to the world as husband and wife, etc.? There are strong arguments against that meaning. In the first place, the phraseology to describe exactly that condition has long been settled and is very familiar, and, if the authors of the code had such a meaning, it seems hardly possible that they should reject this familiar and expressive phraseology. Instead of saying that consent must be followed by "habit and repute," or "by the parties holding each other out to the world as husband and wife, which would have left no doubt as to their meaning, they adopt this uncouth phrase, which does not necessarily have such

substantially described as follows: In construing every provision of the code the court should regard the text alone as the ultimate and only authority. It should treat the text of every provision as a new and independent utterance or creation of the law, and not as declaratory of, or even as being connected with any pre-existing law. It should interpret every provision solely by itself, by ascertaining the fair and reasonable meaning of its language, but without looking beyond it at the pre-existing law for explanation, and should thus construe and apply every

a meaning. But in the second place, such an alteration of the common law rule seems to be entirely without any reason, and opposed to common sense. Under the law previous to the code, proof that two parties had treated each other as husband and wife, had lived together as such, and had held each other out to the world as such, was sufficient to enable a jury or court to infer and find the fact of a marriage. Why? Not at all because such living and holding out *of itself constitutes a marriage*; but solely because from such living and holding out, the court and jury may find that at some previous time the two parties did as a fact consent to be married; did, as a fact, agree to be husband and wife. This conclusion is sustained by all the decisions of authority. The previous actual consent or agreement to be husband and wife is the ultimate and essential fact which the jury must find; the mode of life, the holding out, and the like, are nothing but circumstantial evidence from which that fact may be inferred. Now, when living as husband and wife, and holding out as such, were only necessary as evidence for the purpose of *inferring* the fact of a previous consent, it seems strange and useless to require evidence of the same kind, of holding out and living as husband and wife, and the like, when the fact of a prior consent has already been clearly established by other and independent evidence. There seems to be no good sense in such a great alteration of the common law doctrine. The uncertainty in the meaning of this most important section can only be removed by judicial interpretation. In such provisions, so nearly affecting all classes of persons, the meaning ought to be clear and unmistakable. The true construction of this section is one of the most important legal questions involved in the notorious Sharon case.

Again, in §§1460-1466,¹ the civil code defines covenants running with the land and those not running with the land, together with the rights and liabilities flowing from them respectively, in strict accordance with the common law rules, as settled in Spencer's case, and in subsequent decisions. There can be no doubt that the common law rules, on the subject, are enacted by these sections, without any change. Turning to §§ 822-823,² we find sections, the language of which, taken literally, *seems* to abolish all distinction between covenants running with the land, and those not running with the land, when contained in leases. In other words, these sections seem to make the assignees of the lessee, and the assignees of the lessor, liable for the breach of all covenants, whether they are such as run with the land or not. It seems strange that the common law rule on this subject should be altered at all, for they were in the highest degree just and right; and, on the other hand, it is clearly unjust to make assignees liable for *all* the covenants made by their assignors—whether lessee or lessor. It seems equally strange that such a sweeping change in the common law rules should be made in this indirect and unequivocal manner. Here, again, nothing but a judicial interpretation can solve the question, and remove the doubt.

¹ Secs. 896-902 of Proposed Civil Code of N. Y.

² Sec. 875 of Proposed Civil Code of N. Y.

provision according to its own terms, without enquiring or even caring whether it agreed with, altered, or abrogated any previous rule of law on the subject. In short, the very text of the code should be followed without deviation, as though it was the only and original source of the rule which it contains ; and the text should be fairly and reasonably interpreted so as to get at its exact meaning in all cases. Behind the text the court should not go.

If this principle of interpretation were strictly and uniformly followed by the court, members of the bar would undoubtedly be able to form some well founded and correct opinion as to the meaning and effect of sections which had not yet been judicially interpreted ; and they could thus advise their clients with some reasonable assurance of correctness. But there are, as I shall attempt to show, insuperable objections to this system in its application to our civil code.

On the other hand, the court might regard the code as primarily and mainly a declaration and enactment of common law rules. They might interpret every provision as intended to be a mere statement of the common law doctrines unchanged, with all its consequences, unless from the unequivocal language of the provision a clear and certain intent appeared to alter the common law rule. They might construe all new, hitherto unused, and ambiguous phraseology, as not designed to work a change in the pre-existing settled rules, unless the intent to work such a change was clear and unmistakable. This, I submit, is the general principle of interpretation which the courts should adopt and apply without any deviation to the civil code.

We can conceive of circumstances under which the first of these two systems or principles would be appropriate and advantageous. If a code were absolutely complete, so that the pre-existing jurisprudence might be blotted out without injury to society ; if it embodied and enacted every rule of the law necessary for the regulation of human affairs, so that courts would never be obliged to go outside of its provisions, and to take a rule from the pre-

vious statute or common law ; if its arrangement and classification were made according to strictly scientific principles, so that there was no conflict, omission, or obscurity ; if the phraseology adopted by its authors were uniform and consistent throughout all of its provisions, so that no doubt could arise as to the meaning of particular words or clauses ; then the courts might, perhaps, follow the first mentioned system in its interpretation, without wrong to suitors, and without injury to the law of the State. This would more especially be the case if such a code dealt exclusively with the penal or criminal law, rather than with that department of jurisprudence which relates to private civil rights and duties. For example, if the code of criminal law, hereinbefore described, now pending before the British Parliament, should be enacted, the English courts might well apply to it this purely textual principle of interpretation, and might be under no necessity of invoking the aid of common law doctrines in order to determine the meaning and effect of particular provisions.

All these features and elements, however, which could warrant such a mode of judicial exposition and treatment, are utterly wanting in the civil code of California.

My fundamental proposition, to which all of the foregoing discussion is merely introductory, may therefore be stated as follows: Except in the comparatively few instances where the language is so clear and unequivocal as to leave no doubt of an intention to depart from, alter, or abrogate the common law rule concerning the subject-matter, the courts should avowedly adopt and follow without deviation the uniform principle of interpreting all the definitions, statements of doctrines, and rules contained in the code in complete conformity with the common law definitions, doctrines, and rules, and as to all the subordinate effects resulting from such interpretation. A general intent of the legislature to re-enact and declare common law doctrines and rules, with all their consequences, should be assumed and strictly enforced by the courts in their work of interpreting all the provisions, except in the few special

instances where a contrary intent is unequivocally manifested by the particular language. Although in formulating a particular rule, the authors of the code may have abandoned the customary and familiar phraseology of judges and text-writers, and have adopted terms hitherto unused and unknown ; and even although a particular definition, statement of doctrine, or rule may be so expressed that, if the provision stood alone, as a new and independent creation, unconnected with any pre-existing law, its *literal* import and meaning might be different from the common law, yet the courts should apply the same principle, should recognize and enforce the same general intent, and should regard such provisions as enactments of common law definitions, doctrines, or rules—unless the language left no doubt whatever of a design to depart from the common law. No provision of the code should be interpreted by itself alone ; its meaning and effect should be discovered by a comparison with all the other provisions relating to the same subject-matter, and especially by a reference to the pre-existing and still existing common law rules.

The correctness of this proposition seems to be clearly established by the following, among other reasons, some of which extend with equal cogency to all codes, while the others apply with special force to our civil code.

First.—The common law as a form of jurisprudence possesses certain peculiar excellencies, acknowledged by all able jurists to belong to it in the highest degree, which constitute its essential characteristics, and which render it, in those respects, superior to any other form of municipal law in its adaptability to the needs of a progressive society ; and a code should be so composed, and especially should be so interpreted and construed by the courts, as to preserve to the greatest possible extent these peculiar excellencies. The distinguishing element of the common law, and one of its highest excellencies, is its elasticity, its power of natural growth and orderly expansion. Its doctrines, however formulated, are not limited to any fixed, existing condition of facts, but they may, by virtue of

their own inherent power, be extended to new facts and circumstances, as these are constantly arising in the intercourse of men and transactions of life. The peculiarity of statutes, on the other hand, is their rigidity. Statutory rules once enacted cannot be readily modified and expanded by the courts so as to cover new facts and relations not included within their expressed terms. I may be permitted to quote language which I had used with reference to this subject in another place: "What is required in any form of national jurisprudence that it may best accomplish its design? First, that the several rules should be clear, precise and certain, so that the citizen, as far as the nature of the subject will admit, may understand them, and be instructed in his duty. Secondly, that these rules should be comprehensive, so that they may embrace not only transactions and relations already known, investigated, and in terms provided for, but all others which may naturally arise in the progress of society. Thirdly, that those rules, however stringent they may be, should not forever remain fixed and immovable, the same through all time, but should possess in themselves the inherent power of adaptation to the wants of a progressive people, being able to withdraw from the forms of the past, and fit themselves to the life of the present. Fourthly, that these rules, as they exist at any time, should be flexible, containing provisions for exceptions to their general requirements, so that when a case does not fall within the reason, although it may within the letter, of a regulation, it shall not be controlled by such rule contrary to justice and equity. Fifthly, that these rules should not be arbitrary, and disconnected, but should be united together by general principles into one complete system, with parts mutually dependent and sustaining."*

Of these five requisites the single one of certainty is claimed on behalf of codes as their chief and distinguishing excellence; while even the ablest advocates of codification

*Pomeroy's *Introduct. Munic. Law*, § 326.

concede that all the others are possessed in the highest degree by the common law, and by it alone. That all these peculiar features are of the utmost importance to the well being of society, and that no system of national jurisprudence can be perfect without them, it needs no argument to show. All the really able jurists of the highest authority in England and in this country, who have advocated the system of codification, have expressly recognized and fully admitted this peculiar excellence of our common law. They have insisted that the same excellence *can* be preserved in a code ; and that a national code, in order to accomplish its beneficial design, should be drawn up by its authors, and interpreted by the courts, so as to preserve this distinctive feature of the common law, in connection with the element of certainty belonging especially to codification. By far the ablest of all the English advocates of codification was Mr. John Austin. It is not too much to say that all the present tendency in favor of codes among the lawyers and judges of England, is the direct result of his teachings. While urging the benefit to be derived from codification, he freely admits the very great difficulty of framing a code which shall come up to his ideal, and produce the benefits theoretically belonging to that form of a national jurisprudence. He dwells at large upon the distinguishing elements of elasticity, expression and progressive development possessed by the common law, and declares that the same elements may be, and could be preserved in a code properly planned and executed in conformity with the perfect ideal or type. We thus reach the conclusion that the element of certainty should not be attained in a code by a sacrifice of all these other peculiar features which belong to the common law ; but on the contrary, these distinguishing excellencies of the common law should be preserved and maintained in connection with the "certainty" which, it is claimed, accompanies statutory legislation.

It must be confessed that the authors of our civil code, in formulating its provisions, have done little to retain, even if they have not completely lost sight of and ignored,

these attributes of the common law. These peculiar excellencies of the common law, therefore, if they are preserved at all, must be secured and maintained by the judicial interpretation given to the code. It is only by construing and interpreting the code as being declaratory of common law definitions, doctrines, and rules, that the element of elasticity, expansion and comprehension can be preserved and made efficient. Indeed, the very element itself, as applied to and connected with the code, consists wholly in such a mode of interpretation. If each section were interpreted textually, as a new and independent enactment, all the peculiar excellencies and advantages of the common law system would at once disappear from our State jurisprudence. If, on the other hand, these sections are generally interpreted as being merely declaratory of common law definitions, doctrines, and rules, those doctrines and rules would remain as efficient parts of our jurisprudence, unchanged in substance, operation, and effect, although clothed with a statutory form. The doctrines while embodied in the code, under the authority of the legislature, would still retain the elasticity, the power of expansion and of adaptation to new facts and circumstances, and the comprehensiveness which belonged to them in their original form as portions of the "unwritten" common law,—or law promulgated by judicial decisions. Many of the examples given in the previous pages will furnish illustrations of this effect. If the § 2444, concerning the liability of one held out as a partner heretofore examined,* were interpreted textually, with no reference to the pre-existing law, by giving a strict literal meaning to the word "communicated," the result would be a doctrine quite different from that of the common law, rigid and inflexible in its operation, and capable of applying to one condition of fact alone. All the flexibility, justice, and equity of the common law doctrine would be lost at one blow. If, however, no special effect is given to the

* See *ante*, pp. 21-22.

word "communicated," and the section is interpreted simply as an enactment of the familiar common law doctrine, then that doctrine, although clothed in statutory language, will retain its original breadth and flexibility, and will apply to every possible condition of fact which comes within its scope and operation. If §§ 2316 and 2317, previously discussed,* are interpreted as declaratory of the common law, as intended to reach the general doctrines as to the nature and effect of "express authority" and "implied authority" of agents, then these sections will apply to and control all the various facts and relations which can arise in the affairs of life, as fully and as certainly as though the doctrines which they embody had remained in their original common law form, and had not passed through the hands of the legislature. I need not multiply illustrations. Every intelligent lawyer will appreciate the paramount importance of construing the civil code so that its sections shall preserve all the flexibility, comprehensiveness, and power of expansion and adaptation which are the peculiar and distinguishing excellencies of the "law of judicial decision," or so called "unwritten common law."

Second.—The civil code, as a matter of fact, was not designed to make any general alterations in the established doctrines and rules of the common law. In this connection it should be carefully remembered that the rules of our jurisprudence, as they existed before the code was adopted, included the doctrines and rules of equity, as well as those of the common *law*, technically so called. These doctrines and rules of equity, and of the law, as they had been established by judicial decision previously to the code, were, on the whole, eminently just and equitable, and were particularly well adapted to our social and business wants, and to our modes of thought and life. No serious objection was made to the *substance* of the then existing jurisprudence; the objections were urged to its *form* and

* See *ante*, pp. 26 and 27.

outward condition, to its being scattered through innumerable decisions and isolated statutes, so that it could only be known to the professional lawyer. This defect it was proposed to remedy by a code. The main object of a code, and the principal benefit claimed to result from it, was the single element of certainty. By a code, it was asserted, the existing rules of the law might be collected from the decisions, statutes, and text-books, in which they were then scattered, and arranged into one systematic body, and might thus become known to all persons of average intelligence. In all the movement in favor of codification, no design appeared to make new law. The sole purpose was to put the established rules of the law, most of which then existed merely in the form of judicial decision, into a statutory and definite form and language. The authors of the code were, in reality, to be compilers, rather than creators of law. The correctness of these statements is shown by the writings of the ablest advocates of codification in England and in the United States ; by all the discussions which preceded the adoption of our own codes ; and by the official reports of the commissioners, who prepared the proposed civil code in New York, and of the commissioners who drafted the civil code of California. While a few incidental rules were objected to, and avowedly changed, the main purpose to clothe *existing* rules in a statutory form is everywhere apparent.

Such being the fact, it follows, as a necessary consequence, that this intent and main design of the authors of the code should be constantly recognized, and carried into effect by the courts. In construing and interpreting the text, courts should proceed upon the assumption that the settled rules of law and equity are not changed, but are simply re-enacted in all their force and with all their effect, *even though there is some verbal deviation from the familiar language and mode of formulating these rules in almost every section.* It is only where, from the language employed, and the mode of expression, an intent to alter the previous law is unequivocal, and beyond all doubt, that the courts should interpret a provision as making any

change. In this manner alone can the main design of the code be carried into operation.

Third.—The civil code does not embody the whole law concerning private and civil relations, rights, and duties ; it is incomplete, imperfect, and partial.

It is, perhaps, inevitable that the system of codifying the private civil jurisprudence, the common law and equity—shall finally prevail in this country and in England. One fact, however, is true, if any certain conclusion can be drawn from both reasoning and experience. The benefits which are claimed for the system of codification, *avowedly belong only to a complete code*—to a code which shall embody the complete existing civil jurisprudence of the State, absolutely all of the legal rules which are recognized as operative, whether originally created by statute or by judicial decision. Such a code should cover the whole domain of civil jurisprudence, so that the courts should find in it the source of all their decisions, and should never be obliged to go behind it and borrow a rule from the pre-existing common law or equity. Austin, who is the leading advocate of codification among the English jurists, and who really originated the movement in England and in this country, bases all his reasoning upon such a complete and exhaustive code ; but while holding it up as an ideal, he fully admits the great difficulty of framing a code which shall at all fulfill the conception and produce its anticipated benefits. It seems to me that reasoning and experience, alike, show that a mere partial civil code, a code which only professes to contain elementary definitions, the most general doctrines, and a few special rules, leaving the great mass of practical rules and doctrines still existing as a part of the common law and equity by its side, is only an additional source of uncertainty and confusion introduced into the jurisprudence of a State. As this description applies in the most direct manner to the civil code of California, the inquiry remains, how far may this uncertainty and confusion be lessened or removed by its judicial interpretation.

The civil code is at most only an outline. It does not

purport to embody the entire jurisprudence of the State ; it contains only portions of that jurisprudence, and even those portions are given in a fragmentary manner. One very noticeable feature of the code is, that it makes no distinction whatever between the rules of law and of equity. By far the greater part of its definitions, doctrines, and rules are purely legal; and when any equitable doctrines and rules are given, they are commonly mingled up with legal rules, as though the two departments had no separate existence. Indeed, the code seems to be drawn upon the assumption that all distinctions between "law" and "equity" had been abrogated, and that the two had been combined into one homogeneous system; and it absolutely gives no indication whether any rule is legal or equitable. As a whole, the code is exceedingly meager and deficient in the statement of equitable doctrines. A very great number of the most important, well settled, and necessary doctrines and rules of the equity jurisprudence are nowhere formulated, mentioned, nor alluded to, nor included by necessary implication in any portions of the text.

In the chapters or titles upon each distinct topic, such as agency, partnership, negotiable instruments, guaranty, suretyship, trusts, wills, etc., etc., the uniform plan of the code is as follows: It gives general and elementary *definitions* of legal relations, terms, and transactions, which are uniformly stated in an exceedingly brief and concise manner, and are often stated in language differing somewhat from that which has been usually employed by judges and text writers. It formulates a number, greater or less, of the more general *doctrines*, which are sometimes clothed with a new phraseology, and are always expressed in an exceedingly abstract, condensed, and concise manner, without amplification or explanation, without illustrations or applications, and without going into any detail of the separate individual consequences or results flowing from these very general doctrines. These very consequences have been developed in the form of innumerable special and single rules, through the progressive courts of judicial decision ; and it is, in fact, *these special rules which really*

constitute the body of our law as a practical jurisprudence, and which are constantly quoted and relied upon by the courts as the practical guides and precedents ("the cases in point"), in the daily work of adjudicating upon the new controversies which arise in the varying affairs of life. *Almost all of these special and single rules are omitted*; the code is chiefly composed of quite general and abstract doctrines. Finally, in treating of important topics, such as agency, negotiable instruments, partnership, and the like, the code sometimes adds a very few,—one or two, two or three,—special and single rules, applicable to certain definite, ascertained, and fixed conditions of fact. In almost every instance, these special single rules are plainly introduced in order to settle and render certain some particular question concerning which there had previously been a doubt or difference of opinion arising from a conflict of decision between courts of different States, or between English and American courts, or perhaps between the decisions of the same court. The rule had been laid down differently by different courts, and the authors of the Code plainly intended to remove all doubt, and to make the rule certain by the special provision of the text. The whole number of particular rules belonging to this class, is, however, very small.

In all these general doctrines and special rules, the instances are very few in which the authors of the code have plainly and unequivocally altered a settled common law doctrine or rule. In making this statement I would carefully guard against a possible misconception of my meaning. Of course, I do not refer to those portions where, either from considerations of policy, or borrowing from previous legislation, the code has departed widely from common law doctrines in respect to some entire and important subject matter—for example, the provisions concerning married women's property and contracts, community property, inheritance and succession, express trusts in law, contingent remainders, homesteads, the abolition of dower and curtesy, and the like—

subjects in respect to which the entire theory of the common law has been abandoned.

The result is there reached that, taking the jurisprudence of the State as a whole, and leaving out of view subjects of the kind last above mentioned, the great mass of actual, practical rules of law and equity which immediately guide the courts in their work of adjudicating, are not expressed in the code, are not even included by necessary implication in what is expressed. For such rules the courts must go outside of the code, and must find them in the pre-existing and still existing common law or equity, untouched or unaltered by the code. The daily experience of the courts demonstrates the truth of this conclusion. Very few cases are decided in which legal or equitable rules drawn from a source outside of the code, are not invoked as necessary for the decision. Some adequate notion may be formed of the enormous number of single, specific, separate rules constituting our entire jurisprudence as settled by the courts, by a reference to a complete and exhaustive digest of reported decisions, or to the works of text writers. The "United States Digest," extending to and including the year 1869, consists of fourteen large volumes, each volume averaging about 800 pages, and the matter is so condensed that each paragraph is the statement of a distinct and separate rule. A separate additional volume of the same size is required to contain the decisions of each subsequent year. If by a comparison of digests and text-books we should assume that the total jurisprudence of the State dealing with private civil relations, rights and duties, consisted of 50,000 separate, specific rules, then the civil code, by the largest allowance, would not contain, expressly or by necessary implication, more than 5,000 of this number.

This condition seems to demand most imperatively that the principle of interpretation, which I have suggested, should be followed by the courts without deviation, in order to prevent the law of the State from becoming inextricably confused and contradictory. In all our litigations arising under every branch of the mercantile or commer-

cial law, or under the general law of contracts, or of personal rights, etc., the courts must invoke and be governed by the settled rules of the common law and of equity outside of the code, as well as the rules on the same subject matters contained in the code. In cases involving the law of agency, notes and bills, partnership, bailments, trusts, and the like, the decision must still frequently depend upon these external rules in place of or in addition to the doctrines which the authors of the code have incorporated into its text. In fact, the great majority of the *practical* rules upon which the courts must rely, are thus to be found outside of the code,—parts of the great common law and equity systems left untouched by the codification. Such being the case, an obligation of the highest character rests upon the courts, that the results of their invoking and following these two species of authority thus binding upon them, should be harmonious, consistent and not contradictory. For example, a cause arising under the law of agency, decided upon the authority of a provision in the civil code, should not conflict in any manner with a similar cause decided under the authority of a common law rule external to the code. This obligation, I submit, can be successfully fulfilled only in one manner,—by interpreting all the provisions of the code as declaratory of common law or equitable doctrines and rules, unless the intent to make a change clearly appears from the unequivocal language of the text. The results of adjudication in all controversies would then harmonize with the settled rules of law and equity that have not been embodied in the code ; all conflict between the rules expressed in the code and those external to it would be obviated. The truth of this conclusion will clearly appear, I think, from the following considerations. If the courts do not adopt this uniform principle of interpretation, but, on the contrary, interpret *each* provision of the code textually, according to its literal terms, without reference to the pre-existing law or equity, then one or the other of two alternative effects must necessarily be produced. *First*. Either there would arise the very antagonism, conflict and contradiction, which I have

mentioned, between the special and particular rules derived by judicial decision from the doctrines formulated in the code, and those contained in decisions based solely upon the authority of common law and equity doctrines and rules still left in operation outside of the code; or, *Second*. In order to escape this conflict, the courts would be compelled to modify and alter, to a greater or less extent, the whole body of common law and equitable rules existing external to the code, so as to bring them into a conformity with the express provisions of the code as thus interpreted and construed. In other words, the courts would be forced to undertake the enormous and even appalling labor of reconstructing the entire system of common law and equity jurisprudence, so far as the same had not been embraced within the text of the civil code. There is plainly no other possible alternative. One or two simple examples will sufficiently illustrate my position. If § 2444, concerning the liability of one held out as a partner,* heretofore mentioned, is interpreted by the courts as simply declaratory of the established common law general doctrine, without modification, then all the special rules on the subject, laid down by the courts, by which persons are declared to be liable under a great variety of particular circumstances, would still remain in full force, to be invoked by our judges under proper cases, as much applicable and authoritative under the code as before its enactment.

But if this section should be interpreted textually, as altering and restricting the common law doctrine, by means of the word "communicated," then, as a matter of course, many of these special rules, resulting from the common law doctrine, would no longer be applicable; they must either be altered, or else entirely rejected and others substituted in their place. Again, under the common law, general doctrines concerning the nature and extent of "express" authority, and "implied" authority of agents, hundreds of special rules have been laid down by the decisions, declaring principals to be liable or not

* See *ante*, p. 21.

liable, as the case may be, from the acts of their agents under particular circumstances. If §§ 2316 and 2317* are interpreted as merely declaratory of these common law general doctrines without modification, then all of these special rules would be as applicable and as binding upon the courts under the code as before it, and the law of agency would continue to be a consistent and harmonious system. If, however, these sections are interpreted textually, as modifying the common law doctrines to such extent as would seem to be required by a strict adherence to the very letter, it is not too much to say that the law, which has regulated the relations between principals and third persons, arising from the acts of agents, would thereby be revolutionized. The courts would be compelled, virtually, to reconstruct this most just and equitable branch of the law merchant.

Fourth and last. The very defects, omissions and characteristics of the civil code in its language, style and mode of composition, described in previous articles, are most urgent grounds for adopting this principle of interpretation.

The ground stated under the foregoing head may possibly be regarded by some as merely theoretical and speculative, and as having no practical value. Some members of the bar may, perhaps, consider it a matter of no importance whether the peculiar excellencies of the common law are retained in construing the code, or whether the authors of the code had no general intent to change the common law doctrines, or whether the results of judicial decisions based on the code, are consistent and harmonious, and therefore the reasoning may be treated by them as having no force and cogency. On the other hand, the reasons which fall under the present head are in every respect practical; their force must be recognized and felt by every lawyer; their effect cannot be obviated, since they arise from the very fact that a judicial interpretation of the text is necessary.

* See *ante*, p. 27.

It has already been shown in previous articles that the definitions, statements of doctrines, and rules contained in the civil code, everywhere assume and require a full knowledge of the previous common law and equity rules concerning the same subject matters. No meaning at all can be given to some of the provisions, and no full, complete and accurate meaning to any of them, without a resort to the common law and equity as they existed at the time when the code was adopted. To illustrate by one or two examples taken at random, without such a reference not only to the general doctrines, but even to the minute and special rules of the common law and of equity, it would be impossible to give any true interpretation,—hardly possible to find any satisfactory meaning,—of the sections concerning libel and slander, fraud, suretyship, guaranty, contracts of indemnity,* etc. On the other hand, certain subdivisions of the sections concerning duress furnish an example of an unequivocal intent to alter—or rather add to—the settled doctrines of the common law.† I need not add anything on this subject to what was said in the previous pages. Now, since the provisions of the code thus assume a knowledge of pre-existing law, and since a resort thereto by the courts is absolutely essential, the only method by which any certain, consistent, and just results can be attained through an interpretation of these provisions, is by adopting and following the principle that they are, in general, declaratory of common law and equity rules. While the text of the code plainly discloses the pre-existing law and equity as its basis and source, it does not furnish the courts, in general, with any certain means of determining when or to what extent it departs from that original. The very characteristics of the text, its conciseness, condensation, abstract mode of statement, render it impossible

* Civil Code, §§ 45-47 (defamation) (N. Y. Code, sec. 31-33); 1572, 1573, 1709, 1710 (fraud) (N. Y. Code, secs. 986, 987, 988, 989); 2840, 2845 (suretyship) (N. Y. Code, sec. 2450); 2794, 2819 (guaranty) (N. Y. Code, sec. 2400); 2778 (indemnity) (N. Y. Code, secs. 2380.)

† *Ibid.*, §§ 1569, 1570.

for the courts, in interpreting a particular provision, to fix upon any plain meaning differing from the common law,—to decide in what instances, in what manner, and how far the general language had altered the rule of law or of equity on the subject previously settled. The provisions of the code refer the courts back to the previous law for their meaning and effect; but under the light thus obtained, no other and different meaning can with certainty and precision be given to their terms. Under this view, the principle of interpretation which we advocate, is not a matter of choice, it becomes a necessity. The practice of the authors of the code, heretofore described, of abandoning familiar legal terms and phrases, and of adopting in their place terms and phrases hitherto unknown in legal nomenclature, is subject to the same observations. While these new, unusual and unknown words and phrases do produce more or less uncertainty, and thus require judicial interpretation to settle their meaning, they do not, in general, enable the courts to fix upon any clear and precise meaning different from the common law; they do not enable the courts to determine with exactness whether, and to what extent, the previous law has been altered.*

* In this connection, I add another instance of uncertainty, growing out of the very general mode of expression, and requiring judicial construction. The common law rule seems firmly settled that a factor having the goods of his principal in his possession for sale, cannot pledge them for any purpose whatever without express authority. A pledge no matter for what purpose, even though the money raised thereby was used by the factor for the benefit of his principal, was nugatory; the principal could disregard the pledge, and retake the goods from the pledgee without repaying the latter's advances. As this common law rule often worked great hardship in ordinary business transactions, it was modified in the early part of the present century, by a statute of the British Parliament, called the "Factor's Act." Similar legislation has been enacted in many American States. This statute rendered such pledges valid as against the principals, although the factors had acted in violation of their authority in favor of pledgees who had made an advance on the credit of the goods pledged, in good faith, and without notice of the principal's rights. On this subject the civil code contains the following sections: In the article on "Factors," are the following: "§ 2368.¹ In addition to the authority of agents in general, a factor has actual authority from his principal: 1, to insure the property, etc.; 2, to sell on credit anything intrusted to him for sale, etc., *but not to pledge, mortgage, or barter the same.*" "§ 2369. A factor has ostensible authority to deal with the property of his principal as his own, in transactions with persons *not having notice* of the actual ownership." In the chapter on "Pledges," there is the following: "§ 2991. ²One who has allowed another to assume the apparent ownership of property for the

¹ Sec. 1871 of proposed Civil Code of N. Y.

² Sec. 2625 of Proposed Civil Code of N. Y.

It may be possible to draw up a code of the private civil jurisprudence, to which the principle of interpretation which I have thus advocated, would not necessarily apply.

If a code was so constructed that, while it formulated all the doctrines and rules of the common law and equity, with such alterations, amendments, and additions as were thought proper, it still retained in all its parts the distinguishing excellencies of those systems,—their elasticity, their power of expansion, of development, of continuous adaptation to the progressive condition of society; if such a code, in addition to the detail of doctrines and rules, also embodied all the leading *principles* of the common law and of equity, to be interpreted not according to the letter of their statutory expression, but as living and fruitful sources of doctrines and rules, to the same extent and in the same manner as before their being clothed with a statutory form; if such a code contained *all* of the existing doctrines and rules of the jurisprudence, stated in a complete manner, in consistent phraseology, with sufficient amplifications, explanations, illustrations, and applications, then the courts might look no further than the text of the legislation; might regard the code as the origin, the creation

purpose of making any transfer of it, cannot set up his own title to defeat a pledge of the property, made by the other to a pledgee who received the property in good faith, in the ordinary course of business, and for value." In *Davis v. Russell*, 52 Cal., 611, 616, the court cite § 2991, and hold that it gives a factor the power to pledge. The court do not refer to the other sections above quoted, nor was their attention called to them by the arguments of counsel as reported. Even if by § 2369 a factor has "ostensible" or implied power to pledge, that power is expressly confined to pledgees *not having notice* of the principal's rights of ownership. But the language of § 2991 is so broad that it might seem to validate pledges made by factors to pledgees who had notice of the principal's rights, under some circumstances. Even if there be no direct conflict between these sections, there is an ambiguity as to their true meaning and operation, which judicial interpretation alone can remove.

It has been suggested to me that in giving § 55 of the civil code defining marriages as an example of uncertainty, in a previous page (*ante*, p. 50), the remarks which I made concerning one mode of construing its language, might exert an influence upon the decision of any action which may be pending before the courts, involving the judicial interpretation of this section, and might thus be prejudicial to one or the other of the litigant parties. It is certainly unnecessary for me to say that no such effect was intended or suspected, nor shall I for a moment assume that suggestions, so casually made, *could* have the slightest influence upon the minds of judges in determining any pending controversies. The whole scope of my essay is apparent,—to point out various kinds of ambiguities and uncertainties which arise mainly from the phraseology and mode of composition adopted by its authors, and which seem to require that a uniform system of interpretation

